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In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether a public school district created a "limited public forum" by opening the baseball field fence at a public high school to advertisements and in so doing, whether a public school district may discriminate against an advertisement listing the Ten Commandments consistently with the free speech clause of the First Amendment of the United States Constitution?

2. Whether a public school district's discrimination in excluding an advertisement listing the Ten Commandments from a public high school baseball field fence because of its religious content is an unreasonable restriction on speech under the free speech clause of the First Amendment to the United States Constitution, regardless of whether the school district created a "limited public forum" or a "nonpublic forum"?

3. Whether a public school district's discrimination in excluding an advertisement listing the Ten Commandments from a public high school baseball field fence because of its religious content is impermissible "viewpoint-based" discrimination under the free speech clause of the First Amendment of the United States Constitution?

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II. OPINION BELOW

The opinion below was filed by the United States Court of Appeals for the Ninth Circuit on November 8, 1999. The Court's opinion in *DiLoreto v. Board of Education of the Downey Unified School District* is reported at 196 F.3d 958 (9th Cir. 1999).

III. STATEMENT OF JURISDICTION

Edward DiLoreto originally filed this action in the Superior Court of the State of California for the County of Los Angeles alleging violations of his state and federal guarantees to the right of free speech and the free exercise of religion under the First Amendment of the United States Constitution, and applicable provisions of the California Constitution. Respondents removed this action to the United States District Court for the Central District of California pursuant to 42 U.S.C. section 1441(b). The District Court had original jurisdiction over this action as an action arising under the laws and Constitution of the United States pursuant to 42 U.S.C. section 1441.

The District Court, the Honorable Carlos Moreno presiding, granted respondents Edward Sussman, Betty Ferraro and Margo Hoffer's (collectively "respondents") Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). [Excerpt of Record ("ER") pp. 303-322; Docket No. 39]. Mr. DiLoreto filed a timely appeal to the United States Court of Appeals for the Ninth Circuit.

On November 8, 1999, the United States Court of Appeals for the Ninth Circuit entered an order and filed a written opinion affirming in part, and vacating in part, the District Court's order granting respondents' motion for summary judgment. *DiLoreto v. Board of Education*, 196

F.3d 958 (9th Cir. 1999). Petitioner Edward DiLoreto petitions this Court for writ of certiorari under Rule 11 of the Rules of the Supreme Court of the United States.

IV. CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

This case involves the right to free speech and free exercise of religion under the First Amendment to the United States Constitution, as applied to state and local governments by the due process clause of the Fourteenth Amendment to the United States Constitution.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

V. FACTUAL AND PROCEDURAL BACKGROUND

A. Statement of Facts

This case arises out of a solicitation by Downey Unified School District to Petitioner Edward DiLoreto ("Mr. DiLoreto" or "Petitioner"), an 85-year-old businessman in Downey, California. On December 26, 1995, Mr. DiLoreto was solicited by the Downey High School Baseball Booster Club for a donation to help purchase and fund improvements for the baseball field at Downey High School ("Downey Field"). [See Separate Statement of Uncontroverted Facts and Conclusions of Law ("SUF") ¶ 8, E.R. at 151-168.] As part of a new program at Downey High, the club would produce and erect an

advertisement on a four foot by eight foot sign for Mr. DiLoreto on the Downey Field fence in return for a $400 donation. (SUF ¶ 8, E.R. at 155.)

Mr. DiLoreto submitted artwork to Downey High School Baseball Booster Club ("Booster Club") member Mark Sheldon that listed the Ten Commandments for printing on the sign he had purchased. (SUF ¶ 10, E.R. at 156.)

Mr. Sheldon brought Mr. DiLoreto's proposed artwork to Downey High School Baseball Coach Dan Bryan ("Coach Bryan") because of the religious nature of the sign. (SUF ¶ 13, E.R. at 157.) Coach Bryan informed Mr. Sheldon that he would have to get approval of the artwork submitted by Mr. DiLoreto. (SUF ¶ 13, E.R. at 157) The artwork was submitted to Downey High School principal Allan Layne, who then denied the proposed artwork for posting on an advertising sign because of its religious content. (SUF ¶ 17, E.R. at 158.) In January 1996, Mr. Sheldon assisted Mr. DiLoreto in obtaining approval of the sign by Mr. Layne by suggesting a sign with similar content, which was less wordy. (SUF ¶ 16, E.R. at 157) Once again, Mr. Layne refused to allow the sign's posting because of its religious content. (SUF ¶ 17, E.R. at 158.) Mr. Layne's decision to refuse Mr. DiLoreto's sign was eventually ratified by the School District, Superintendent Edward Sussman and the school board. (SUF ¶ 20, E.R. at 159.)

On March 14, 1996, Mr. DiLoreto had a conversation with Dr. Sussman, who informed Mr. DiLoreto that school officials were concerned about a possible lawsuit should the sign be erected. (SUF ¶ 36, E.R. at 164.)

Mr. DiLoreto next sought to secure a legal opinion from the Attorney General for the State of California,[1] and on September 13, 1997 Mr. DiLoreto received an official opinion from Attorney General Dan Lungren that stated in part:

> If a school district sells commercial advertising space on a fence surrounding its high school baseball field, it may not refuse to accept an otherwise appropriate advertisement which contains the Ten Commandments and clearly identifies the advertising party.

79 Op. Cal. Atty. Gen. 196 (1996).

On September 25, 1996, Mr. DiLoreto, retired California Superior Court Judge Harry Shafer, and others, met with Dr. Sussman, School Board President Ms. Ferraro, and Board Member Ms. Hoffer. (SUF ¶ 22, E.R. at 159.) Mr. DiLoreto alleged that at the meeting, all present agreed that the sign would be permitted and posted at the ball field. (Complaint at 4-5, ¶ 16, E.R. at 4-5.) Respondents denied this allegation. (Defendants' First Amended Answer to Plaintiff's Complaint, ("Answer") at 4, SUF ¶ 16, E.R. at 109). The following day, Mr. DiLoreto sent Dr. Sussman a confirming memoranda outlining the details of the agreement. (SUF ¶ 23, E.R. at 160.) Dr. Sussman admits receiving this memoranda, but never responded to it. (SUF ¶ 24, E.R. at 160.)

Sometime around the late evening or early morning of October 3, 1996, the District reneged on its agreement with Mr. DiLoreto and removed all signs from the baseball field fence. (SUF ¶ 29, E.R. at 162.)

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[1] There exists a dispute as to whether Mr. DiLoreto obtained the opinion on his own initiative, or whether he was asked to obtain an opinion by Dr. Sussman as a precondition to posting the sign. However, it appears that this dispute, at least for the present, is an immaterial one.

B. Procedural Background

Mr. DiLoreto filed his complaint on May 2, 1997 in the Superior Court of the State of California for the County of Los Angeles. (E.R. at 1-25.) Respondents removed the action to the United States District Court for the Central District of California and subsequently filed a Motion to Dismiss and a Motion for Sanctions pursuant to Fed. R. Civ. Proc. 11 for filing a "frivolous" lawsuit. (E.R. at 26-28, Docket No. 2.) Mr. DiLoreto opposed the Motion to Dismiss and filed a Motion to Remand for Lack of Subject Matter Jurisdiction. (E.R. at 29-49, Docket No. 3.)

On July 25, 1997, the District Court issued an order remanding the pendent state law claims for lack of subject matter jurisdiction pursuant to the Eleventh Amendment to the U.S. Constitution and retained only Mr. DiLoreto's federal constitutional claims under 42 U.S.C. section 1983. (E.R. at 82-84, Docket No. 10.) Mr. DiLoreto filed a First Amended Complaint with the District Court on August 6, 1997. (E.R. at 805-105, Docket No. 11.)

Mr. DiLoreto moved for summary judgment, which was denied by the district court. The Court then invited respondents to file their own summary judgment motion. (E.R. at 335, Docket No. 26.) Before the district court ruled on respondents' motion, Mr. DiLoreto filed a motion for reconsideration given the Ninth Circuit's opinion in *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *withdrawn, reh'g en banc granted*, 165 F.3d 1265 (9th Cir. 1999), *vacated as moot on reh'g*, 177 F.3d 789 (9th Cir. 1999), which was decided during the pendency of the motion. The district court granted respondents' motion for summary judgment and denied petitioner's motion on the grounds that under the decision of the United States Supreme Court in *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed.2d 199 (1980),

the Establishment Clause of the First Amendment to the United States Constitution prohibited the posting of the Ten Commandments on the baseball field fence at Downey High School. (E.R. at 337, Docket No. 39.)

Mr. DiLoreto appealed the order of the District Court to the United States Court of Appeals for the Ninth Circuit. On November 8, 1999 the United States Court of Appeals entered an order affirming in part, and vacating in part the district court's order granting respondents' motion for summary judgment. The Court of Appeals held that because the baseball field fence at Downey High School was a "nonpublic forum" opened for a limited purpose, respondents' refusal to post Mr. DiLoreto's Ten Commandments sign did not violate his right to free speech. *DiLoreto*, 196 F.3d at 967. Because the Court of Appeals held that Mr. DiLoreto's right to free speech had not been violated, it did not reach the issue of whether posting the Ten Commandments on a public high school's baseball field fence violated the Establishment Clause of the First Amendment to the United States Constitution. *DiLoreto*, 196 F.3d at 969. The Court of Appeals also vacated the portion of the District Court's order that held that Mr. DiLoreto's claims were barred under the doctrine of res judicata.[2] *DiLoreto*, 196 F.3d at 964 n.3.

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[2] Likewise, the Los Angeles County Superior Court granted respondents' motion for summary judgment with respect to Mr. DiLoreto's state law claims that were remanded by the District Court on the grounds that posting the Ten Commandments sign would violate the establishment clause of the California Constitution. (CAL. CONST. Art. I, § 4) Mr. DiLoreto appealed this order to the California Court of Appeal, which held that the baseball field fence at Downey High School was a nonpublic forum. However, the three judge panel was divided as to whether posting the Ten Commandments would violate the establishment clause of the California Constitution, and no

VI. ARGUMENT

A. The Decision of the United States Court of Appeals for the Ninth Circuit in this Case Conflicts with Decisions of the United States Court of Appeals for the Second, Third and Seventh Circuits.

The decisions of the United States Court of Appeals for the Ninth Circuit in this case as well as *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert denied*, ___ U.S. ___, 119 S. Ct. 1804, 143 L. Ed.2d 1008 (1999) and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1990), are in conflict with decisions of the United States Court of Appeals for the Second, Third, and Seventh Circuits.

1. The Ninth Circuit's Characterization of the Baseball Field Fence at Downey Field as a Nonpublic Forum Is Inconsistent with Cases from the Second, Third and Seventh Circuits in Which Governments Created Limited Public Forums by Selling Advertising Space on Governmental Facilities.

In the instant action, the Ninth Circuit, relying on its opinion in *Children of the Rosary*, held that the baseball field fence at Downey High School is a "nonpublic forum opened for a limited purpose." *DiLoreto*, 196 F.3d at 967. The characterization of the baseball field fence as a nonpublic forum conflicts with cases from other Circuits which have held on similar facts that opening public property for commercial advertising creates a limited

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majority opinion was formed on the issue. *DiLoreto v. Board of Education*, 74 Cal. App. 4th 267, 87 Cal. Rptr. 791 (1999), *petition for review denied*, (Justice Kennard and Justice Brown dissenting from the denial of the petition for review).

public forum and is subject to constitutional limitations with respect to a public agency's refusal to post controversial messages.

When determining what restrictions that government may place on the use of its property, the cases of the U.S. Supreme Court reflect a "forum based" approach. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705, 120 L. Ed.2d 541 (1992). Restrictions on speech in a public forum that has traditionally been available for public expression are subject to the highest scrutiny; any regulations forbidding such speech must be narrowly drawn to achieve a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed.2d 794 (1983). A second category of public property is a limited public forum, one that the state has opened for expressive activity by part or all of the public. Regulation of a limited public forum is subject to the same restrictions as that governing a traditional public forum. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955. The remaining forum is a non-public forum, which includes all remaining property. In a non public forum, the challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955.

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 797, 142 L. Ed.2d 659 (1999), the Third Circuit held that a transportation authority created a limited public forum by opening itself up to receive advertising by the public. *Christ's Bride*, 148 F.3d at 251. The speech at issue in *Christ's Bride* were public service announcements in Philadelphia area subway and railway stations that suggested that women who had abortions suffer more and deadlier breast cancer. *Christ's*

Bride, 148 F.3d at 245. In finding that the advertising space was a designated public forum for purposes of the First Amendment, and that the speech at issue fell within the scope of the forum, the Third Circuit reasoned that the goal of the transit authority was to generate income by leasing ad space and that the posters which presented messages concerning abortion and health issues were suitable for the speech for which that particular public forum was created. *Christ's Bride*, 148 F.3d at 251-52.

In *New York Magazine v. Metropolitan Transit Auth.*, 136 F.3d 123, *cert. denied*, ___ U.S. ___, 119 S. Ct. 68, 142 L. Ed.2d 53 (2d Cir. 1998), the Second Circuit also held that New York's transportation authority created a limited public forum by its acceptance of commercial and political advertising. *New York Magazine*, 136 F.3d at 130. At issue in that case were advertisements on New York City buses by New York Magazine that featured the New York Magazine logo and read, "Possibly the only good thing in New York Rudy hasn't taken credit for." *New York Magazine*, 136 F.3d at 125.

In *Planned Parenthood Association/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit held that the Chicago Transit Authority ("CTA") had created a public forum by accepting advertisements in buses and transit cars. *Chicago Transit Auth.*, 767 F.2d at 1232. The advertisements at issue involved ads for a planned parenthood organization that "mentioned the availability of counseling about 'prenatal care, abortion, or adoption.' " *Chicago Transit Auth.*, 767 F.2d at 1227.

The opinions of the United States Courts of Appeal in *Christ's Bride*, *New York Magazine*, and *Chicago Transit Authority* from the Second, Third, and Sixth Circuits respectively, holding that a governmental agency creates a limited public forum when it sells advertising space and

may not discriminate against controversial messages, conflicts with the decisions of the Ninth Circuit in *DiLoreto*, *Children of the Rosary*, and *Clark*, which have allowed content-based restrictions on controversial subjects despite the fact that the governmental agencies were involved in selling advertising space.

2. The Ninth Circuit's Decisions in *DiLoreto*, *Children of the Rosary* and *Clark* Cannot Be Reconciled with *Christ's Bride*, *New York Magazine* and *Chicago Transit Authority*.

In *Children of the Rosary*, the Ninth Circuit attempted to distinguish its holding that the City of Phoenix may refuse advertisements in support of a pro-life position on the subject of abortion on municipal buses – despite the fact that it had opened up the forum by selling advertising space – from the decision of the Third Circuit in *Christ's Bride*. In *DiLoreto*, the Ninth Circuit, relying on *Christ's Bride*, attempted to distinguish its holding in this case from *Christ's Bride* and *New York Magazine*. For the reasons set forth below, these attempts by the Ninth Circuit to fashion a distinction in its cases upholding content-based restrictions in what would otherwise be limited public forums are both artificial and unconvincing, and only serve to permit governmental agencies in the Ninth Circuit to discriminate against advertisers whose messages may be unpopular with government officials.

In *Children of the Rosary*, the Ninth Circuit attempted to distinguish that case from *Christ's Bride* in allowing the City of Phoenix to refuse advertisements from an anti-abortion organization in light of the City's interest in maintaining neutrality and preventing a reduction of income earned from selling commercial advertising

space. *Children of the Rosary*, 154 F.3d at 978-79. The advertisements at issue in *Children of the Rosary* stated:

Before I formed you in the womb, I knew you
God
Jeremiah 1:5
CHOOSE LIFE!
Children of the Rosary

Children of the Rosary, 154 F.3d at 975.

In attempting to distinguish its case from *Christ's Bride* and other cases, the Ninth Circuit found that the City of Phoenix had a previous policy of restricting advertising to speech which proposes a commercial transaction, and prohibited advertising which "advocates or proposes a religion." *Children of the Rosary*, 154 F.3d at 975. The Ninth Circuit stated that the agencies involved in *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine*, had histories of receiving similar advertisements and had no policies with respect to the acceptance of advertising.

Likewise in an attempt to distinguish *DiLoreto* from the decisions of the Second and Third Circuits, the Ninth Circuit wrote:

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but reserve it for commercial speech. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-304, 94 S. Ct. 2714, 41 L. Ed.2d 770 (1974) ("[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed on its vehicles.") *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently

> enforced policies restricting bus ads to commercial advertising); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 68, 142 L. Ed.2d 53 (1998) ("Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal.") However, where the government has historically accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora. See *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Auth.*, 148 F.3d 242, 252 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 797, 142 L. Ed.2d 659 (1999) (finding city's practice of permitting virtually unlimited access to forum created designated public forum); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230, 1232 (7th Cir. 1985) (finding public forum given transit authority's history of accepting controversial public issue advertising).

DiLoreto, 196 F.3d at 965-66.

These distinctions, however, are unconvincing for four reasons: (1) the test for determining whether a designated public forum is not whether a governmental agency has restricted similar types of controversial speech based on content in the past, but whether the challenged expression is incompatible with the use to which the facilities have been reserved; (2) allowing a governmental body to exclude a category of speech does not ipso facto render the forum a nonpublic forum because allowing such would permit government to convert a limited public forum into a nonpublic forum by impermissibly excluding speech based on content; (3) the elevation of constitutional protections of commercial

speech over religious or noncommercial speech departs from established Supreme Court jurisprudence; and (4) distinctions between commercial speech and noncommercial speech as a basis for exclusion leads to absurd results.

a. The Test for Determining Whether a Designated Public Forum Was Created Is Whether the Challenged Expression Is Incompatible with the Use to Which the Facilities Have Been Reserved.

As the United States Supreme Court has made clear, "avoidance of controversy is not a valid ground for restricting speech in a public forum. . . . " *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811, 105 S. Ct. 3439, 3453, 87 L. Ed.2d 567 (1985)). The Ninth Circuit has attempted to fashion a distinction between this case and other cases where a governmental agency has a "history of accepting political ads and a wide variety of controversial public issue ads" to determine whether a designated public forum was created. *DiLoreto*, 196 F.3d at 967. Controversy, however, is not the test to determine whether a designated public forum has been created. The test for determining "whether the government intended to create a designated public forum" is *"the nature of the property and its compatibility with expressive activity."* *DiLoreto*, 196 F.3d at 965 (citing *Cornelius*, 473 U.S. at 802, 105 S. Ct. 3439) (emphasis added).

In holding that the baseball field fence at Downey High School was not a limited public forum, the Ninth Circuit, citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed.2d 592 (1998) stated below:

> We also "examine[ ] the nature of the property and the compatibility with expressive activity to discern the government's intent."

> *Cornelius*, 473 U.S. at 802, 105 S. Ct. 3439. Generally, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood*, 484 U.S. at 267, 108 S. Ct. 562 (quoting *Perry*, 460 U.S. at 47, 103 S. Ct. 948). *Hazelwood* constrain[s] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Clark*, 941 F.2d at 825 (citing *Hazelwood*, 484 U.S. at 270-73, 108 S. Ct. 562). This takes into account the school's "pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is." *Id.* at 827, 108 S. Ct. 562.

DiLoreto, 196 F.3d at 962.

Hazelwood, however, has no application here because in *Hazelwood*, the speech at issue, articles for a high school newspaper which did not meet standards of journalistic professionalism, was incompatible with the pedagogic concerns of a public high school. Judge Norris stated in his dissent in *Clark*:

> Even if the Clark County School District could somehow show that it reserved the ad space for a specific, lawful purpose that narrowed its discretion, it could still escape strict scrutiny. In *Cornelius*, *Perry* and *Hazelwood*, reasonableness review was appropriate *only because the challenged expression was clearly incompatible with the use to which the facilities had been reserved*. . . . This is not the case here. Planned Parenthood's ad is no more incompatible with the school district's purpose in opening up its

> publication to advertisers than "Hair" was incompatible with the municipality's purpose in opening up its theaters for theatrical expression in *Southeastern Promotions*.
>
> Selling advertising served one purpose: to raise money. Planned Parenthood's ad, which would have been paid for like any other, was obviously compatible with that purpose. Moreover, the district does not claim that the ad was inconsistent with written guidelines barring advertisements for products that were unlawful or inappropriate for minors. Planned Parenthood's ad was not illegal and the district makes no claim that it was inappropriate for high school students.

Clark, 941 F.2d at 835-36 (Norris, J., dissenting) (emphasis added). With regard to "respecting audience maturity," and the District "disassociating itself from speech inconsistent with its educational mission," this Court has previously stated in the context of religious speech at public schools:

> We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 250, 110 S. Ct. 2356, 2372, 110 L. Ed.2d 191 (1990).

In the same way that the expressive use of advertisements on buses and subway stations would not have interfered with providing rail transportation facilities to the public (*Christ's Bride*, 148 F.3d at 250), Mr. DiLoreto's Ten Commandments sign, and the other signs that graced the Downey Field fence would in no way have interfered with the fence's purpose: to mark the outer boundaries of the baseball field. The reasonableness analysis made by

the Ninth Circuit would not be appropriate absent some incompatibility with respect to the speech and the forum for which access is being sought. As the Third Circuit stated:

> The goal of generating income by leasing ad space suggests that the forum may be open to those who pay the requisite fee. SEPTA has specified a few areas in which it will not freely accept advertising: alcohol and tobacco advertising beyond a specified limit and ads deemed libelous or obscene. These restrictions do not apply to CBM posters. Beyond these limitations, there are no specific restrictions on the types of advertising that SEPTA will accept. In effect, SEPTA's reservation of the right to reject any ad for any reason does not conclusively show that it intended to keep the forum closed.

Christ's Bride, 148 F.3d at 251. Likewise, Mr. DiLoreto's Ten Commandments sign was paid for and was accomplishing the goal that the forum was intended to accomplish – until the District discontinued the entire sign program, because of respondents' hostility towards religious expression.

b. A Governmental Body's Decision to Exclude a Category of Speech Does Not Ipso Facto Render the Forum a Nonpublic Forum Because Government Would then Be Permitted to Convert a Forum Into a Nonpublic Forum by Impermissibly Excluding Speech Based on Content.

In *DiLoreto*, the Ninth Circuit distinguished its holding allowing content-based restrictions on speech from cases such as *Christ's Bride* and *New York Magazine* because "District officials excluded certain subjects from

the advertising forum as sensitive or too controversial for the forum's high school context. . . . For example, the District rejected advertisements for alcohol or taverns, as well as Planned Parenthood." The Ninth Circuit also stated that "the fact the District screened for and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion."[3] *DiLoreto*, 196 F.3d at 967.

The proposition that a governmental body can turn a limited public forum into a nonpublic forum by exercising content-based restrictions on the type of speech

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[3] In *DiLoreto*, the Ninth Circuit stated that "the District's practice of excluding certain subjects from the forum distinguishes this case from *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine* on which Mr. DiLoreto relies." *DiLoreto*, 196 F.3d at 967. However, there is no evidence of any written guidelines, much less any formal or informal policy on which types of ads would be excluded. There were no policies with respect to any aspect of the Downey Baseball Boosters sign program and any "purported policy had been contrived for this action." *Chicago Transit Auth.*, 767 F.2d at 1228.

Additionally, the *DiLoreto* court, in an effort to distinguish this case from *Christ's Bride*, attempted to characterize advertisements for the Freemasons as not being religious in nature, and cited Webster's dictionary for the proposition that the Freemasons are "an international fraternal and charitable organization." *DiLoreto*, 196 F.3d at 967. This assertion however, is belied by common knowledge. Freemasonry "recognizes the strong bond which unites all people under one Creator. The masonic fraternity teaches a man to be faithful to his responsibilities to God. Each has a personal belief in a Supreme Being." Grand Lodge of California Website, www.freemason.org. "The mason is instructed that his fraternal obligations involving aid to members are to be subordinated to the duty he owes to God." Encarta Encyclopedia, "Freemasonry," (1998). The Ninth Circuit's distinction is artificial.

allowed is absurd. With respect to the illogical results that such a rule would lead, the Second Circuit stated:

> However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a nonpublic forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a nonpublic forum from the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. See *Cornelius*, 473 U.S. at 813-14, 105 S. Ct. at 3455 (Blackmun, J. dissenting). We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to a designated public fora.

New York Magazine, 136 F.3d at 129-30. Judge Norris also commented on the perverse results of this distinction employed by the Ninth Circuit to allow content-based restrictions on speech:

> The majority assumes that government officials may create a nonpublic forum and escape strict scrutiny merely by declaring their intent to control content as they see fit. So long as the government reserves for itself broad, better yet, unbridled discretion to censor expression, then it will be deemed to have intended to create a nonpublic forum, and its content-based exclusions will escape strict scrutiny. This so-called public forum test, which finds dispositive whatever public officials say the scope of their censorship authority is, has the perverse effect of limiting judicial scrutiny of exactly the discriminatory, content-based exclusions most suspect under the First Amendment. The Supreme Court

> has never adopted – and in fact, has explicitly rejected – this public forum test, even in the context of public schools.

Clark, 741 F.2d at 831 (Norris, J., dissenting).

Because allowing content-based restrictions on speech in these contexts presents a danger of viewpoint discrimination and contains no standard for guidance as to prohibited and allowable conduct, governmental actors must not be allowed to determine the scope of their own ability to act as censors by making content-based exclusions of speech in a limited public forum. As the Third Circuit stated:

> It contravenes the First Amendment to give government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

Christ's Bride, 148 F.3d at 252 n.5.

c. Commercial Speech Cannot Be Meaningfully Distinguished from Non-Commercial Speech without Absurd or Anomalous Results.

The Ninth Circuit's opinions in *DiLoreto* and *Children of the Rosary* have the anomalous result of actually favoring commercial speech over religious speech, and turns this Court's commercial speech jurisprudence on its head. *DiLoreto*, 196 F.3d at 955 ("government policies and practices . . . [which] have allowed commercial advertising, but have excluded political and religious expression . . . indicate an intent . . . to reserve [the forum] for commercial speech"); *Children of the Rosary*, 154 F.3d at 976 ("the city has consistently restricted political and religious advertising"). Further, the realities of the distinctions between offering more protection to commercial speech likewise leads to perverse results.

With respect to the place religious speech occupies in our constitutional system, this Court has stated:

> Our precedent establishes that private religious speech, far from being a first amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. [citations] Indeed, in Anglo American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a *free-speech clause without religion would be Hamlet without the Prince.*

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S. Ct. 2440, 2446, 132 L. Ed.2d 650 (1995) (emphasis added).

Conversely, this Court has held that commercial speech receives substantially less constitutional protection. *See Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L. Ed.2d 469 (1983). In remarking upon the anomalous outcome that the Ninth Circuit's opinion in *Children of the Rosary* resulted, Judge Noonan stated:

> It is something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech. As Justice White has observed, such a result "inverts" the normal rule . . . Moneymaking is not the government's primary business. It would be ironic if pursuit of profit permitted a unit of government to discriminate in the messages on government property.

Children of the Rosary, 154 F.3d at 984 (Noonan, J., dissenting). In both *DiLoreto* and *Children of the Rosary*, those who desire to promote religious messages are placed in a strange position of being forced to characterize their advertisements as commercial to obtain the preferred treatment that such speech is accorded under the Ninth

Circuit's holdings in these two cases. Indeed, in *Children of the Rosary*, in an effort to obtain the preferred treatment that the City of Phoenix was according commercial speech, the Arizona American Civil Liberties Union attempted to characterize the advertisements as commercial by offering the sale of a bumper sticker in the ads. *Children of the Rosary*, 154 F.3d at 975. Ironically, in *Christ's Bride*, the defendants argued that the posters at issue and CBM's message was transformed into commercial speech, and thereby subject to substantially less constitutional protection. *Christ's Bride*, 148 F.3d at 247.

Judge Noonan further demonstrated the anomalous, and discriminatory, results that occur when commercial speech is favored over noncommercial speech:

> Here, the message of a group acknowledging the sacredness of human life in the womb is rejected; Planned Parenthood could run an ad for an abortion clinic. The views clash. The city of Phoenix would give space to one and not the other. Analogously, if Arizona should permit physician-assisted suicide as does Oregon, Dr. Krevorkian could advertise his services on the sides of buses of Phoenix, but the counter advice of advocates offering free counseling against this course would be forbidden. The examples of the great life issues in our present culture speak for themselves. The clash over the environment affords other examples. A power company could extol its product. The Sierra Club, objecting to more dams, would be denied the forum. The makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred. A developer could tout the quality of his homes; defenders of green space in the suburbs would have to be silent on the buses. The pornographer could advertise his shop; the defenders of neighborhood decency

> would be denied a reply. In the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem.

Children of the Rosary, 154 F.3d at 984-85 (Noonan, J., dissenting). Because treating commercial speech more favorably than religious or noncommercial speech leads to anomalous results and departs from established First Amendment jurisprudence of this Court, the petition for certiorari should be granted.

B. Excluding an Advertisement Listing the Ten Commandments from a Public High School Baseball Field Fence Because of its Religious Content Is an Unreasonable Restriction on Speech under the Free Speech Clause of the First Amendment to the United States Constitution Regardless of Whether the School District Created a "Limited Public Forum" or a "Nonpublic Forum."

"In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum.' " *DiLoreto*, 196 F.3d at 967 (quoting *Cornelius*, 473 U.S. at 806, 809, 105 S. Ct. 3439). "The 'reasonableness' analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it was dedicated." *DiLoreto*, 196 F.3d at 967 (citing *Perry*, 460 U.S. at 50-51, 103 S. Ct. 948). Petitioner recognizes that as a general rule, "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free School*

Dist., 508 U.S. 384, 390, 113 S. Ct. 2141, 2145, 124 L. Ed.2d 352 (1993) (failing to rule on the issue of whether the public school classroom was a nonpublic or limited public forum because the regulation at issue was neither reasonable nor viewpoint neutral). However, the exclusion of all religious speech from a nonpublic forum of the type presented by this case is unreasonable.

Respondents unabashedly admit the reason behind their refusal to post Mr. DiLoreto's Ten Commandments sign on an equal basis was because of Establishment Clause concerns. (Answering Brief at 9, 24.) There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. But this interest is not implicated here. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 761-62. On *three previous occasions*, when there was a combination of private religious expression, a forum available for public use, a content-based regulation, and a State's interest in complying with the Establishment Clause, the Supreme Court struck down the restriction on religious content. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 762; *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 275, 70 L. Ed.2d 440 (1981).

The Ninth Circuit has similarly held with respect to placing religious items on public walls in the California Department of Education that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials. *Tucker v. State Bd. of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996). The Ninth Circuit has stated:

> The challenged ban not only prevents employees from posting non-controversial information that might interest some or all employees – such as bulletins announcing the time and location of church services, invitations

> to children of employees to join a church youth group, and newspaper clippings praising Billy Graham, Mother Theresa or Cardinal Bernardin – it would also ban religious messages on controversial subjects such as abortion, abstinence of various types, family values, and the v-chip. Material that addresses controversial topics from a non-religious viewpoint would, however, be permissible, as would signs inviting employees to motorcycle rallies, swap meets, x-rated movies, beer busts, burlesque shows, massage parlors or meetings of the local militia. The prohibition is unreasonable not only because it bans a vast amount of material without legitimate justification but also because its sole target is religious speech.

Tucker, 97 F.3d at 1215. With respect to the reasonableness of such a ban on religious speech the Ninth Circuit continued:

> . . . . the sweeping ban on the posting of all religious information would clearly be unreasonable. Reasonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government sponsored or endorsed. Certainly a total ban on posting religious information of any kind is an unreasonable means of obviating such a concern.

Tucker, 97 F.3d at 1215.

This court has also prohibited singling out religion or religious viewpoints for discriminatory treatment. "The government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599, 108 L. Ed.2d 876 (1990). It has also been observed that "government may not use religion as a basis of classification, for the imposition of duties, penalties, privileges or

benefits." *McDaniel v. Paty*, 435 U.S. 618, 639, 98 S. Ct. 1322, 55 L. Ed.2d 593 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment).

Here, the Respondents have admitted numerous times that the reason behind their refusal to erect Mr. DiLoreto's Ten Commandments sign was the religious nature of contents of the sign. (Answering Brief at 9, 24; Defendants' Opposing Separate Statement of Controverted/Uncontroverted Material Facts ¶ 30 (E.R. at 195). Not only is this flat ban against religious speech unreasonable, but it is hardly viewpoint neutral. This is because such a ban has the effect of preventing not only messages that discuss religion generally, but also silencing religious perspectives on controversial subjects in general. *Tucker*, 97 F.3d at 1216. The State may not ban all private religious speech, or even discriminate against it, by requiring religious speech alone to disclaim public sponsorship. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 769. *See also, Lamb's Chapel*, 508 U.S. at 393 ("permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" was unconstitutional viewpoint discrimination); *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 812, 105 S. Ct. 3439, 3454, 87 L. Ed.2d 567 (1985) (viewpoint discrimination unreasonable even in a nonpublic forum).

As the ban against religious speech was only applied to Mr. DiLoreto's sign, and no other, and because the district refused to allow the posting of the sign simply because of its religious content, the regulation at issue was neither reasonable nor viewpoint neutral as these terms have been employed by numerous Supreme Court precedents. Such restrictions have been specifically rejected by the Second, Third, and Seventh Circuits. The

special attributes of the baseball field fence are consistent with the access sought by Mr. DiLoreto. There is nothing inherently disruptive about signs (whether religious or not) on the outfield fence of a baseball field.

C. Discrimination by a Public School District in Excluding an Advertisement Listing the Ten Commandments from a Public High School Baseball Field Fence Because of its Religious Content Is Impermissible "Viewpoint-Based" Discrimination.

The distinction between permissible subject matter discrimination or impermissible viewpoint discrimination is a distinction that "is not a precise one." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831, 115 S. Ct. 2510, 2517, 132 L. Ed.2d 700 (1995).

Here, the Ten Commandments were singled out because of their religious perspective. Respondents have admitted that the reason for refusing to post Mr. DiLoreto's Ten Commandments sign was the religious nature of the advertisement. (SUF ¶ 40, E.R. at 166.)

As Superintendent Edward Sussman frankly admitted:

> Q: What was your reaction to Mr. DiLoreto offering his services of three attorneys to represent the District should the District be sued in the event of a lawsuit?
>
> A: I asked him to have them contact me, and none ever did.
>
> Q: Why did you ask him to have them contact you?
>
> A: So at least I could, you know, verify the validity of their willingness to do that. One I happen to know personally.
>
> Q: Would you have been willing to place a sign had one of them offered to do so?

A: I would have probably taken it into consideration.

Q: Would you have been willing to place a sign had Mr. DiLoreto agreed to indemnify the District?

A: Probably.

Sussman Depo. at 49:18-50:9. There is simply no space for doubt that the reason Respondents refused to allow Mr. DiLoreto to place a sign of the Ten Commandments was because of the *content* of the message. It is clear that the respondents have some misguided ideas about their responsibilities with respect to the separation of church and state, ideas that have no legal support whatsoever. Instead, respondents chose to violate Petitioner's right to free speech by refusing to post his sign. The record points out that petitioner's sign was refused, before a single sign had actually been posted at Downey Field. (SUF ¶ 38, E.R. at 165.)

As the District allowed others to place advertising signs of their choice, and in fact posted approximately 40 signs after Mr. DiLoreto had been refused his, the record demonstrates that the reason behind refusing Petitioner the same opportunity that had been provided to other merchants in Downey is due to a misguided hypersensitivity to church-state separation.[4]

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[4] In *Tucker*, the Ninth Circuit noted that "an 'open-forum' policy does not confer any 'imprimatur of state approval on religious sects or practices.' " *Tucker*, 97 F.3d at 1212 (quoting *Widmar*, 454 U.S. at 273). This Ninth Circuit also noted in *Tucker* that "there must be a 'plausible fear' that the speech in question would be attributed to the state, and [in *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995)] rejected the Establishment Clause argument because there was 'no real likelihood' that the speech would seem to be 'either endorsed or coerced by the state.' " (*Tucker*, 97 F.3d at 1212 (quoting *Rosenberger*, 515 U.S. at 841-42)).

Even after all the signs from the Baseball Booster Club sign program were removed from Downey Field, advertising signs did in fact remain at the District. At Downey Field, a scoreboard with a Coca-Cola sign was allowed to remain well after the other signs were removed. (SUF ¶ 31, E.R. at 163.) Additionally, advertising signs remained up at Gauldin School, a school in the District and have remained up as late as October 1997. (UMF ¶ 33, E.R. at 163.) These facts evidence an intent to discriminate against Mr. DiLoreto's speech based on either the content or viewpoint of his proposed sign.

In *Cornelius*, this Court stated that "[t]he existence of reasonable grounds for limiting access to a non public forum however, *will not save a regulation that is in reality a facade for viewpoint based discrimination.*" *Cornelius*, 473 U.S. at 811. (Emphasis added.) The *Cornelius* Court never had the occasion to rule on the underlying facts of the case because the trial court never made a finding on the issue of whether there was viewpoint-based discrimination. This is because the Court held that the exclusion was unreasonable. *Cornelius*, 473 U.S. at 811. This Court also made similar statements in an earlier case which indicated that the *intent* behind the discrimination will be a factor in whether a government agency had committed a constitutional violation with respect to the use of a non-public forum. *Perry*, 460 U.S. at 48. The facts present in this case dispositively suggest an improper motive to discriminate on the basis of viewpoint. Petitioner was solicited for the opportunity to purchase an advertising

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This Court has also stated that with respect to fears or conclusions that the speech in question is to be attributed to the state, given an open forum, and private sponsorship, "erroneous conclusions" about the symbolic benefit to religion, "do not count." *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 765.

sign at the early stages of the Downey Field's sign program. This was before a single sign was posted. Petitioner's proposed artwork was twice rejected by the principal at Downey High School, a decision which was supported by the Superintendent. Approximately one week after receiving a copy of the Attorney General's opinion – that as long as a school district maintained other commercial advertisements it may not permissibly refuse one that depicted the Ten Commandments – the District did remove all the signs from Downey Field. Additionally, each respondent has pointed out that they were aware of what they called "equal access" laws and that they removed the signs in order to save themselves from posting signs which contained viewpoints with which they disagreed. The admissions by respondents of the reasons they removed the signs, and the close proximity with which they were removed after receiving the Attorney General's opinion, strongly evidences an intent to discriminate, and that the removal of all the signs from Downey Field was in reality a facade for viewpoint based discrimination.

VII. CONCLUSION

Because there exists an irreconcilable conflict between the United States Court of Appeals for the Ninth Circuit on one hand, and the Second, Third and Seventh Circuit on the other with respect to whether the government creates a limited public forum when it chooses to sell advertisements – and is thereby restricted by the First Amendment from making content-based exclusions from such a forum, this petition for writ of certiorari should be granted.

The petition should be granted for the additional reason that the Ninth Circuit's holdings in the instant case and *Children of the Rosary* conflicts with the decisions

of this Court and turns this Court's jurisprudence with respect to the level of constitutional protection afforded religious speech and commercial speech on its head.

Finally, the petition should be granted for the additional reason that this case involves important questions involving the First Amendment to the United States Constitution that should be settled by this Court.

DATED: February 7, 2000 Respectfully submitted,

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Edward DILORETO, Plaintiff-Appellant,

v.

DOWNEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; Edward Sussman, individually and in his capacity as superintendent; Betty N. Ferraro, individually and in her official capacity as president; Margo Hoffer, individually and in her official capacity as a member, Downey Unified School District, Board of Education, Defendants-Appellees.

No. 98-56762.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 4, 1999

Filed Nov. 8, 1999

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Kevin J. Hasson, Washington, DC, for amicus curiae The Becket Fund for Religious Liberty.

Appeal from the United States District Court for the Central District of California Carlos R. Moreno, United States District Judge, Presiding

Before: KOZINSKI and THOMAS, Circuit Judges, and ILLSTON,* District Judge.

ILLSTON, District Judge:

Appellant Edward DiLoreto sued the superintendent of the Downey Unified School District and two members of the Board of Education (collectively "the District") based on the District's refusal to post an advertisement, paid for by Mr. DiLoreto, on Downey High School's baseball field fence. The advertisement contained the text of the Ten Commandments. Mr. DiLoreto contends that the District's refusal to post the advertisement violated his right to free speech under the First Amendment to the United States Constitution. The District raises the defense that posting the sign would have violated the Establishment Clause of the First Amendment and that it feared disruption and controversy that the sign might precipitate. The District Court granted summary judgment to the District, and this appeal followed.

We affirm because we conclude that the baseball field fence was a forum limited to certain subjects and not open for indiscriminate use by the general public. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). We hold that the District could exclude subjects from the nonpublic forum that

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* The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

would be disruptive to the educational purpose of the school. We also hold that neither the District's refusal to post the sign nor the District's later decision to close the forum to all advertising constituted viewpoint discrimination.

I.

The parties do not dispute the material facts. In September of 1995, Downey High School's Baseball Booster Club ("Booster Club") raised funds by soliciting ads from local businesses. The ads were to be posted on the school's baseball field fence in exchange for a $400 donation. Mr. DiLoreto, Chief Executive Officer of Yale Engineering, purchased an ad and submitted a design containing a lengthy message and listing the Ten Commandments. Mr. DiLoreto subsequently revised his proposal to be less wordy. His final ad proposal read as follows:

For Peace in Our Day!
Pause & Meditate on These Principles
to Live By!

1. I am the Lord your God you shall have no other gods besides me.
2. Take not the name of God in vain.
3. Keep holy the Sabbath Day.
4. Honor your father and your mother.
5. You shall not kill
6. You shall not commit adultery.
7. You shall not steal.

8. You shall not bear false witness.

9. Do not covet your neighbor's wife.

10. Do not covet your neighbor's goods.

To earn respect for ourselves & our community we must do noble acts for the love of God & concern for our country. Edward and Jill Di Loreto Family Trust

Mr. Layne, the principal of Downey High School, declined to post the sign, and defendant Edward Sussman, the district superintendent, ratified that decision. The Booster Club refunded Mr. DiLoreto's donation. The District declined to post the sign based on (1) concern about running afoul of the Establishment Clause; and (2) disruption, controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post.

Mr. DiLoreto subsequently sought a legal opinion from the Attorney General of the State of California regarding the legal ramifications of the District's decision not to post the sign. The Attorney General's Office issued an opinion on September 13, 1996, which concluded that refusing to post an otherwise appropriate business advertisement that clearly identified the advertising party and merely incorporated a religious message does not comport with the United States and California Constitutions. 79 Op. Cal. Atty. Gen. 196 (1996). On October 3, 1996, the District discontinued the program and removed approximately forty other signs that had been posted on the

baseball field fence pursuant to paid advertising arrangements with the Booster Club.[1]

The undisputed evidence in the record reflects that the District excluded advertisements from the fundraising program that involved subject matters deemed sensitive and inappropriate in the public secondary school context. For example, the District did not permit advertisements for alcohol or taverns. The District also excluded an ad for Planned Parenthood. Nothing in the record indicates that anything other than commercial advertising was ever permitted on the Downey High School field fence.

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[1] Neither party extensively briefed the question of mootness, although the fact that the District effectively closed the forum by removing the signs raises this issue. A controversy is moot, and therefore nonjusticiable, when it is no longer "ongoing," or where the court is no longer capable of "affect[ing] the rights of litigants in the case before [it]." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)). The Supreme Court has held, however, that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). In a similar situation involving closing a forum, the Seventh Circuit concluded that a live controversy remained. *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 2393, 144 L.Ed.2d 794 (1999) ("[The] current no-display policy, adopted after the commencement of this suit, is not implemented by statute or regulation and could be changed again, so . . . voluntary cessation of the challenged conduct does not eliminate the controversy."). Accordingly, we conclude a live controversy continues to exist, and address the parties' arguments on the merits.

On May 2, 1997, Mr. DiLoreto filed a complaint in Los Angeles County Superior Court alleging, inter alia, violation of his rights to free speech under the United States and California Constitutions. The District removed the action to the United States District Court for the Central District of California. The District Court remanded Mr. DiLoreto's claims under the California Constitution, and retained only Mr. DiLoreto's federal constitutional claims under 42 U.S.C. § 1983. In the state court action, the Los Angeles County Superior Court granted the District's motion for summary judgment. On August 19, 1999, during the pendency of this appeal, the California Court of Appeal affirmed, finding that posting the ad would have violated Article I, section 4 of the California Constitution,[2] and that refusing to post the ad did not violate Mr. DiLoreto's free speech rights under Article I, section 2 of the California Constitution. *DiLoreto v. Board of Educ.*, 74 Cal.App.4th 267, 87 Cal.Rptr.2d 791 (1999).

In the federal action, the District Court denied Mr. DiLoreto's motion for summary judgment, and granted the District's motion for summary judgment. The District Court concluded that posting Mr. DiLoreto's sign would have violated the Establishment Clause of the First Amendment to the United States Constitution. The District Court also concluded that refusing to post the sign

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[2] Article I, section 4 of the California Constitution states:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

did not violate Mr. DiLoreto's free speech rights because the baseball field was a nonpublic forum, and the District's decision not to post the sign was reasonable as well as viewpoint neutral. Mr. DiLoreto filed a timely notice of appeal.[3]

II.

We review de novo a district court's grant of summary judgment. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir.1998). We must determine, viewing the evidence in the light most favorable to the party opposing the motion, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Margolis,* 140 F.3d at 852. When a district court upholds a restriction on speech, the appellate court conducts an independent, de novo examination of the facts. *Tucker v. California Dep't of Educ.,* 97 F.3d 1204, 1209 n. 2 (9th Cir.1996).

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[3] The District Court also held that under the doctrine of res judicata, the judgment in Mr. DiLoreto's state court action barred his federal claims. As Mr. DiLoreto originally brought all claims in one action, and his state and federal actions involve different claims, the doctrine of res judicata does not bar his federal action. *See Nordhorn v. Ladish Co.,* 9 F.3d 1402, 1404 (9th Cir.1993) ("In order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim' as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies.") (citations omitted). Accordingly, this portion of the District Court's order was in error.

III.

The validity of the District's conduct turns on the nature of the baseball field fence as a forum for expression. The Supreme Court has held that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Court employs a forum analysis to evaluate the nature of the property and the corresponding permissible government limitations on expressive activity. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). "Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1804, 143 L.Ed.2d 1008 (1999).

A traditional public forum, such as a public park or sidewalk, is a place "that has traditionally been available for public expression." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (ISKCON). Regulation of speech in a traditional public forum is permissible "only if . . . narrowly drawn to achieve a compelling state interest." *Id.* When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum. *See Children of the Rosary*, 154 F.3d at 976 (citing *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439). Restrictions on expressive activity in designated public fora are

subject to the same limitations that govern a traditional public forum. *See ISKCON*, 505 U.S. at 678, 112 S.Ct. 2701.

All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint. *Id.* at 679, 112 S.Ct. 2701. The Supreme Court recently has used the term "limited public forum" to refer to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics.[4] In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch.*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

The relevant forum is defined by the access sought by the speaker. *Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439. In this case, the relevant forum is the advertising space

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[4] The contours of the terms "designated public forum" and "limited public forum" have not always been clear. Compare *Widmar v. Vincent*, 454 U.S. 263, 267, 273, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (discussing designated public forum "generally open for use by student groups") with *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (discussing "public property that is not a designated public forum open for indiscriminate public use"); *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

on the Downey High School baseball field fence. Mr. DiLoreto contends that the fence was a limited public forum, but it is not clear whether he uses "limited public forum" to refer to a designated public forum subject to heightened scrutiny, or to a type of nonpublic forum that is subject to the reasonableness standard. Mr. DiLoreto concedes in his reply, however, that if the fence is a limited public forum, restrictions on expressive activity are permissible if they are reasonably related to purpose served by the forum and viewpoint neutral. Accordingly, first we must determine whether the fence was a designated public forum subject to heightened scrutiny or a limited public forum subject to the reasonableness standard. Second, we must apply the appropriate standard to the District's actions to determine if they meet constitutional muster.

A.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. In determining whether the government intended to create a designated public forum, the Supreme Court has considered the nature of the property and its compatibility with expressive activity, as well as the policy and practices of the government. *See id.; see also Children of the Rosary*, 154 F.3d at 976. The question is whether these factors indicate an intent to designate a public forum dedicated to expressive activities.

Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-304, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) ("[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."); *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently enforced policies restricting bus ads to commercial advertising); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998) ("Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal."). However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora. *See Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F.3d 242, 252 (3d Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999) (finding city's practice of permitting virtually unlimited access to forum created designated public forum); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230, 1232 (7th Cir.1985) (finding public forum given transit authority's history of accepting controversial public issue advertising).

In addition, where the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has

found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality. *See Lehman*, 418 U.S. at 303, 94 S.Ct. 2714 ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce."); *Cornelius*, 473 U.S. at 805-06, 105 S.Ct. 3439 ("[T]he Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees."); *see also Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817, 824 (9th Cir.1991) (en banc) ("Nor does the evidence suggest that the high schools were 'motivated by an affirmative desire to provide an open forum' for advertising in athletic programs; the schools did not accept advertising for any purpose other than to help defray the costs of this service." (quoting *Cornelius*, 473 U.S. at 805, 105 S.Ct. 3439)).

We also "examine[ ] the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. Generally, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood*, 484 U.S. at 267, 108 S.Ct. 562 (quoting Perry, 460 U.S. at 47, 103 S.Ct. 948). *Hazelwood* "constrain[s] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Clark*, 941 F.2d at 825 (citing *Hazelwood*, 484 U.S. at 270-73, 108 S.Ct. 562). This takes into account the school's "pedagogical concerns, such as respecting audience maturity,

disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is." *Id.* at 827, 108 S.Ct. 562.

In this case, the District did not intend to designate the baseball field fence as a public forum for expressive activity. The school sold advertising space on the fence to defray athletic program expenses by raising revenue through the Booster Club. As in *Lehman, Children of the Rosary* and *Clark*, the intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression. To raise funds, the District solicited business advertisements, thereby limiting the content of the forum through its solicitation practices. District officials excluded certain subjects from the advertising forum as sensitive or too controversial for the forum's high school context. For example, the District rejected advertisements for alcohol or taverns, as well as an ad for Planned Parenthood. School officials also testified that although they did not personally object to the content of Mr. DiLoreto's ad, they were concerned that allowing the ad would indiscriminately open the forum to all advertisements regarding personal beliefs. Although not dispositive, the fact that the District screened and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion. *See Cornelius*, 473 U.S. at 805, 105 S.Ct. 3439 ("The decision of the Government to limit access to the [forum] is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum.") "This type

of selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47, 103 S.Ct. 948.

The District's practice of excluding certain subjects from the forum distinguishes this case from *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine*, on which Mr. DiLoreto relies. In each of those cases, the city or transit authority controlling the bus sign advertisements historically accepted advertisements on a wide variety of subjects. *See Christ's Bride*, 148 F.3d at 251-52 (holding that virtually unlimited access indicated a public forum); *New York Magazine*, 136 F.3d at 130 (noting a history of accepting political advertising); *Chicago Transit Auth.*, 767 F.2d at 1232 (finding a history of accepting political ads and a wide variety of controversial public issue ads indicated a public forum). In contrast, there is no evidence in the record that any political, religious, or controversial public issue advertising was ever permitted on the Downey High School field fence.

The fact that another high school within the District accepted ads for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to ads promoting personal religious beliefs. The forum is defined by the access sought by the speaker, *see Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439, and Mr. DiLoreto only sought access to the Downey High School field fence. The ESP and Freemason signs appeared in a different forum, and nothing in the record demonstrates that the two advertising programs were the same. In addition, ESP Psychic Readings, which advertised its number as 1-800-PSYCHIC, is a commercial enterprise

and the Freemasons are "an international fraternal and charitable organization." Webster's II New College Dictionary 446 (1995). Neither ad contains a religious, or anti-religious, message, and therefore neither is similar to Mr. DiLoreto's sign.

Under these circumstances, we hold that the baseball field fence was a nonpublic forum open for a limited purpose. Accordingly, the District's conduct need only be reasonable in light of the purpose served by the forum and viewpoint neutral to be permissible. *See Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510; *Lamb's Chapel,* 508 U.S. at 392-93, 113 S.Ct. 2141.

B.

In a nonpublic forum opened for a limited purpose, restrictions on access "can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by forum" and all the surrounding circumstances. *Cornelius,* 473 U.S. at 806, 809, 105 S.Ct. 3439; *see also Perry,* 460 U.S. at 49, 103 S.Ct. 948. The "reasonableness" analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated. *See Perry,* 460 U.S. at 50-51, 103 S.Ct. 948. For example, in *United States v. Kokinda,* 497 U.S. 720, 727, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion), the Supreme Court held that prohibiting solicitation on postal property was reasonable because the purpose of the forum (a sidewalk from the parking lot to the post office) was to accomplish the most efficient postal delivery system. In *Perry,* the Court held that denying access to the school's internal mail system to

unions other than the school's official bargaining unit was reasonable given the school's purpose to use the mail system for communication of school business, and to prevent the system from becoming a battlefield for competing unions. *Perry*, 460 U.S. at 51-52, 103 S.Ct. 948. In *Lehman*, the Court held that the city's decision to exclude political advertising from bus signs was reasonable given the city's desire to generate revenue and the potential for "lurking doubts about [political] favoritism, and sticky administrative problems . . . in parceling out limited space to eager politicians." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714 (plurality opinion). Accordingly, even though the actual forum in this case is the advertising space on the fence, the special nature and function of public secondary schools are relevant to evaluating the limits the school may impose on expressive activity. *See Cornelius*, 473 U.S. at 801-02, 105 S.Ct. 3439 (holding that although the forum was the charitable drive itself, the court could consider the special nature and function of the federal workplace in evaluating limits on access).

The District essentially offers two reasons for excluding the subject of religion from the forum. The District's first concern was disruption. The District feared controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post. The District's second concern was the potential Establishment Clause violation presented by posting the Ten Commandments in a public high school.

The District's concerns regarding disruption and potential controversy are legitimate reasons for restricting the content of the ads, given the purpose of the forum

and the surrounding circumstances of the public secondary school. *See Cornelius*, 473 U.S. at 810, 105 S.Ct. 3439 (citing *Perry*, 460 U.S. at 52 n. 12, 103 S.Ct. 948) ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."). We held in *Clark* that a public high school's "decision not to promote or sponsor speech . . . which might place it on one side of a controversial issue, is a judgment call which *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference." *Clark*, 941 F.2d at 829 (citing *Hazelwood*, 484 U.S. at 273 & n. 7, 108 S.Ct. 562). We recognized that a public secondary school has legitimate concerns "such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission, and avoiding the appearance of endorsing views" that render a school's restriction on advertising reasonable. *Id.*, at 827. Therefore, we concluded that a public secondary school could restrict advertising of controversial topics in programs for high school athletic events, even where the school has created a limited public forum for other advertisements. *See id.* at 829-30. The Supreme Court also has recognized that content-based restrictions may be reasonable "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714.

In this case, the testimony of the District officials makes clear their concern that posting Mr. DiLoreto's ad would force the District to open the forum to all expressions of personal beliefs. The school used the athletic field for physical education classes and for school-sponsored sporting events. The District reasonably could have

believed that the controversy and distraction created by political and religious messages raised the potential for disruption of these classes and school-sponsored events, particularly as students at these activities would be a captive audience to the ads. In addition, the District reasonably could have been concerned that the school would be associated with any controversial views expressed in the advertisements on the fence. *See Clark*, 941 F.2d at 827.

Mr. DiLoreto contends that the purpose of the advertising forum was to raise funds for the Booster Club, and that posting his sign would not interfere with that purpose. However, as the California Court of Appeal noted in the parallel California proceeding, even if the District successfully defeated any challenges to the posting of this sign, or others to which the District would have been required to provide equal access, that litigation would have cost the District money, depriving it of the financial benefit the advertising forum was intended to provide. Accordingly, we find that the District's decision to exclude ads on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy.[5]

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[5] The Supreme Court has made clear that the question whether the First Amendment requires a school to tolerate certain speech, such as the speech of students, is different from the question whether the First Amendment requires a school to promote or endorse another's speech. *See Hazelwood*, 484 U.S. at 270-71, 108 S.Ct. 562. Thus the circumstances here are distinguishable from the school's attempt to prohibit student speech in *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

Since we find the District's decision reasonable on this basis, we do not address its concern over the potential Establishment Clause consequences of posting the ad.

C.

Although the District's decision not to post the ad was reasonable in light of the purpose served by the forum, it may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content. *See Cornelius,* 473 U.S. at 811, 105 S.Ct. 3439. This distinction "is not a precise one." *Rosenberger,* 515 U.S. at 831, 115 S.Ct. 2510. Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic. *See,* e.g., *Children of the Rosary,* 154 F.3d at 981 (finding that limiting the forum to commercial ads was a permissible content-based restriction). In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the government "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510.

Mr. DiLoreto contends that his advertisement was compatible with the purposes of the forum, and that even if the District limited the forum to commercial advertising, his sign was a business advertisement. Nothing in the record, however, indicates that the District opened the forum to the subject of religion. Given the potential for disruption and controversy, the District was justified in excluding that subject from the forum. As the Supreme Court noted in *Perry,*

> [i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purposes of the property.

Perry, 460 U.S. at 49, 103 S.Ct. 948. Unlike the other signs that were posted on the fence, Mr. DiLoreto's sign does not advertise, or even mention, a business. Mr. DiLoreto's ad was not a statement addressing otherwise-permissible subjects from a religious perspective; it sets forth the Ten Commandments, which are "undeniably a sacred text in the Jewish and Christian faiths," and "concern[ ] the religious duties of believers. . . . " *Stone*, 449 U.S. at 41-42, 101 S.Ct. 192. We conclude that the District's decision not to post Mr. DiLoreto's sign was pursuant to a permissible, content-based limitation on the forum, and not viewpoint discrimination.

We do not accept amicus curiae The Becket Fund for Religious Liberty's view that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination. This argument mischaracterizes the holding in *Rosenberger*, which involved the University of Virginia's decision to withhold payment of printing costs from a student publication that discussed student life from a Christian perspective. The Court merely held that refusing to fund only religious viewpoints on otherwise-permissible subjects (i.e. pregnancy or homosexuality) was viewpoint discrimination. Indeed, the Court explicitly based its decision on the fact that "the University [did] not exclude religion as a subject matter but

select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Rosenberger*, 515 U.S. at 831, 115 S.Ct. 2510; *see also Lamb's Chapel*, 508 U.S. at 393-94, 113 S.Ct. 2141 (holding that permitting presentation of all views regarding family issues except those dealing with the otherwise-permissible subject matter from a religious perspective constituted viewpoint discrimination).

Nor do we believe that the Constitution prohibited the school from closing the forum in response to appellant's ad. The government has an inherent right to control its property, which includes the right to close a previously open forum. *See Capitol Square*, 515 U.S. at 783-84, 115 S.Ct. 2440 ("The fact that the capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays . . . does not disable the State from closing the square to all privately owned, unattended structures.") (Souter, J., concurring in the judgment); *see also Perry*, 460 U.S. at 46, 103 S.Ct. 948 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."). Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 (11th Cir.1993) (en banc) ("If Georgia fears that it would violate the Establishment Clause by allowing the [religious] display, it can avoid the perception that it is endorsing a religion by . . . closing the [public] forum altogether. . . . "); *see also*

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1290 (7th Cir.1996) (holding that closing a forum to all displays to avoid displaying a religious symbol was not unconstitutional). Accordingly, the fact that the District chose to close the forum rather than post Mr. DiLoreto's advertisement and risk further disruption or litigation does not constitute viewpoint discrimination.

CONCLUSION

We AFFIRM the district court's grant of summary judgment to the appellees on the grounds set forth above. That portion of the district court's order addressing res judicata is VACATED.

Supreme Court, U.S.
FILED
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No. 99-1345

In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD DI LORETO Plaintiff, v. EDWARD SUSSMAN, BETTY FERRARO, and MARGO HOFFER, Defendants.	Case No. CV 97-4028 CM **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION** (Filed Aug. 26, 1998)

The Court, having considered the parties' papers, all admissible evidence filed in support thereof, and without oral argument, hereby **grants** Defendants' Motion for Summary Judgment and **denies** Plaintiff's Motion for reconsideration of Order Denying Plaintiff's Motion for Summary Judgment.

I.

FACTUAL BACKGROUND

Plaintiff Edward Di Loreto has brought the instant action against the superintendent of the Downey Unified School District (the "District"), Edward Sussman, and two members of the District's Board of Education (the "Board"), Betty Ferraro and Margo Hoffer (collectively

"Defendants").[1] Mr. Di Loreto seeks injunctive, declaratory relief, and damages as a result of Defendants' refusal to post a sign paid for by Mr. Di Loreto that included the text of the Ten Commandments.

In or about September 1995, Downey High School Principal Allen Preston Layne gave the Downey High School Baseball Booster Club (the "Booster Club") permission to solicit paid advertising to be posted at the outfield fence of the Downey High School baseball field (the "outfield fence"). The Booster Club offered to post four-foot-by-eight-foot advertising signs on the outfield fence for a one-time fee of $400 and an annual fee of $100 to maintain the sign thereafter.

On December 26, 1995, Mr. Di Loreto agreed to purchase a spot on the outfield fence and submitted the design he wished to post, which included the Ten Commandments as they appear in the Old Testament of the Bible.[2] Mr. Di Loreto, who owns a business called Yale

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[1] All three Defendants are sued in their individual and official capacities.

[2] In addition to the Ten Commandments, the text of the proposed sign included the following:

> For a Peaceful World!!
>
> Throughout the ages rules and governments have tried in vain to achieve PEACE ON EARTH. They have tried wars, written hundreds of thousands of laws, rules and regulations in an effort to control the behavior of man and always failed.
>
> Unto This Day!
>
> Wars, Bitterness, starvation, and hatred continue unabated. When and how did we lose our way? Can it be that it was when we turned away from the

Engineering, paid the Booster Club $400 to post his sign. Because of the religious content of Plaintiff's sign, the Booster Club referred the matter to Principal Layne. In January 1996, a member of the Booster Club worked with Mr. Di Loreto to develop a new sign which also included the Ten Commandments.[3]

Principal Layne denied approval of the sign.[4] Approximately three to four months later, Superintendent

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teachings and laws of GOD? Let's ponder over and read what the Lord has said for us to Obey!

The world can be saved if we begin in the beginning. When a child is born and throughout the formative years, teach the laws of God. They will grow and become better humans and respect and love one another. More laws will not improve this world. Each new law is a challenge to the evil ones. They will find a way to circumvent them. More laws are then required and the cycle never ends. God's Commandments are so simple to follow and people will certainly improve, generation after generation. Do we posses [sic] the will to OBEY? And teach tem [sic] to all?

Edward and Jill Di Loreto Family

[3] In addition to the Ten Commandments, Plaintiff's second proposed sign included the following text:

"For Peace in Our Day!

Pause & Meditate on these Principles to Live By! . . . [The Ten Commandments] . . .

To earn respect for ourselves and our community we must do noble acts for the love of God & concern of our country!

Edward and Jill Di Loreto Family Trust"

[4] Mr. Di Loreto argues that Mr. Layne acted based on the religious content of the sign. Mr. Layne has testified that he acted because of concern over the separation of church and state; potential disruptions due to anticipated media and

Sussman ratified Mr. Layne's decision not to post Mr. Di Loreto's sign and to return Mr. Di Loreto's $400 check. In or about May 1996, Mr. Sussman met with Board Members Ferraro and Hoffer, and maintained the decision not to allow Mr. Di Loreto's sign to be erected on the baseball field. On October 3, 1996, under advice of counsel, the District removed all signs on the baseball field that had been posted pursuant to paid advertising agreements with the Booster Club. For approximately seven months until the program was terminated in October 1996, approximately 40 advertising signs were posted at the baseball field and Mr. Di Loreto's sign was not among them.

On September 13, 1996, the Office of the attorney General of the State of California issued an opinion (the "Attorney General opinion") on the issue. The attorney general opinion concluded, "If a school district sells commercial advertising space on a fence surrounding its high school baseball field, it may not refuse to accept an otherwise appropriate advertisement which contains the Ten Commandments and clearly identifies the advertising party."

In a hearing on May 11, 1998, this Court denied Mr. Di Loreto's motion for summary judgment, finding that the baseball field is a nonpublic forum, the District's decision to exclude Mr. Di Loreto's sign was reasonable,

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community attention; additional disruptions or controversies that might arise from religious or political statements that others might wish to post in response or in addition to Mr. Di Loreto's sign; and anticipated lawsuits from community members seeking to have the sign removed.

and erecting the sign would have violated the Establishment Clause of the First Amendment. The Court revisits these issues in the context of Mr. Di Loreto's motion for reconsideration and Defendants' motion for summary judgment.

Mr. Di Loreto also filed a related state-court action captioned, *Edward Di Loreto v. Downey Unified School District Board*, Case No. VC 024435 (the "state-court action"). On June 1, 1998, Hon. Thomas I. McKnew, Jr. of the Superior Court of California, County of Los Angeles, issued an order granting the District's motion and denying Mr. Di Loreto's motion for summary judgment. The Superior Court found that the outfield fence was a non-public forum, the District's decision to reject Mr. Di Loreto's sign was reasonable, and if the District had posted Mr. Di Loreto's sign it would have violated the Establishment Clause.

II.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a trilogy of 1986 cases, the Supreme Court clarified the applicable standards for summary judgment. *See Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence submitted by the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient to create a genuine issue of material fact. *Id.* at 252. As the Supreme Court explained in *Matsushita*,

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

Id., 475 U.S. at 586-87.

To be admissible for purposes of summary judgment, declarations or affidavits must be based on personal knowledge, must set forth "such facts as would be admissible in evidence," and must show that the declarant or affiant is competent to testify concerning the facts at issue. Fed. R. Civ. P. 56(e). Declarations on information and belief are insufficient to establish a factual dispute for purposes of summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Summary judgment is not treated as "a disfavored procedural shortcut" but as "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. Analysis

1. Plaintiff Is Estopped from Relitigating the Claims and Issues Decided in the State-Court Action

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or the privies from relitigating issues that were or could

have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The doctrine serves to impose finality in litigation, thereby "conserv[ing] judicial resources, protect[ing] litigants from multiple lawsuits and foster[ing] certainty and reliance in legal relations." *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980).

The record of a judgment in state court is entitled to "full faith and credit" in federal court. 28 U.S.C. § 1738. Section 1738 helps to minimize multiple litigation, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on final judgments. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980). Res judicata, or claim preclusion, absolutely bars a subsequent lawsuit if the prior adjudication: (1) involved the same parties or their privies; (2) reached a final judgment on the merits; and (3) involved the same claim. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

Under the related doctrine of collateral estoppel, or issue preclusion, an issue previously adjudicated may not be relitigated if: (1) the issue necessarily decided in the prior litigation is identical to the issue sought to be relitigated; (2) the decision in the prior litigation was final and on the merits; and (3) the party against whom preclusion is sought is the same as, or in privity with, the party to the prior litigation. *See Housing authority of the City of Los Angeles v. Workers' Compensation Appeal Bd.*, 60 Cal. App. 4th 1076, 1082 (1998).

Although neither party has discussed these doctrines, all the elements appear to be present in this case. As far as the Court can tell from the state court order, Mr.

Di Loreto raised the same claim in state court as he raises here, alleging that his rights to free speech and free exercise of religion were abridged by the District's decision not to post his sign. The Superior Court dismissed Defendants Sussman, Ferraro and Hoffer – the same individuals named herein – on the grounds of state governmental immunity. The court then dismissed the free speech and free exercise claims as against the District on the grounds that posting the sign would have violated the Establishment Clause, and that the District's regulation of the outfield fence, a nonpublic forum, was reasonable.

Even if the claims or parties differed slightly in state court,[5] the issues decided in the Superior Court's order of June 1, 1998, are the same as those presented here. As such, having obtained an adjudication on the merits, Mr. Di Loreto appears to be estopped from bringing the instant action for alleged violation of his rights to free speech and free exercise of religion. Nevertheless, because the parties have not briefed the issue or provided the Court with all of the relevant pleadings and documents from the state-court action, and out of an abundance of caution, the Court will address the merits of Mr. Di Loreto's claim.

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[5] The parties have not filed with this court a copy of Mr. Di Loreto's complaint in the state-court action.

2. Posting Mr. Di Loreto's Sign Would Violate the Establishment Clause.

The District asserts as a defense to its action that posting Mr. Di Loreto's proposed sign would have violated the Establishment Clause of the First Amendment. The First Amendment provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. Under the Fourteenth Amendment, the Establishment Clause applies equally to state and local governments. A policy does not offend the Establishment Clause if it passes the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."

Defendants assert that posting Mr. Di Loreto's sign would violate the first two prongs of the *Lemon* test. With respect to the first prong, Defendants rely on *Stone v. Graham*, 490 U.S. 39 (1980). In *Stone*, the Supreme Court held that a Kentucky statute requiring the Ten Commandments to be posted in all classrooms in the state violated the Establishment Clause. *Id.* at 42. The Court found that the "pre-eminent purpose for posting the Ten Commandments on school room walls is plainly religious in nature." *Id.* at 41. Notwithstanding a "legislative recitation of a supposed secular purpose" in the text of the statute, the Court stated that posting the Ten Commandments "has no secular legislative purpose, and is therefore unconstitutional under the first prong of the *Lemon* test. *Id.* Finally, the Court noted, "It does not matter that

the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Id.* at 42.

Mr. Di Loreto argues that *Stone* is inapposite because it involved a statute requiring the posting of the Ten Commandments in every classroom in the state.[6] Mr. Di Loreto asserts that the relevant government action here is the Booster Club's advertising program, which was intended for the secular purpose of raising money for school athletic programs. Defendants argue that the relevant governmental act was the District's ad hoc policy decision not to post Mr. Di Loreto's sign.

The Court finds that the governmental act in question was the Defendants' decision whether or not to post the sign proposed by Mr. Di Loreto. As the Supreme Court found in *Stone*, the fact that Mr. Di Loreto's sign was to be paid for by private funds does not alleviate all Establishment Clause concerns. *Id.* at 42. Rather, posting

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[6] Plaintiff relies instead on *Lamb's Chapel v. Center Moriches Free School Dist.*, 508 U.S. 384 (1993), in which the Court found that allowing a church the same access to school premises that was provided to other community groups would not violate the First Amendment. The Court noted that the church's plans to use school facilities to show a film would not violate the Establishment clause because "the showing of the film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." *Id.* at 395. These facts are easily distinguished because, as discussed *infra*, the baseball field is essentially an extension of the classroom as it is used by students during school hours.

the sign at the District's baseball field – which is essentially an extension of the classroom insofar as it is used by students during school hours and by school-sponsored teams for extracurricular workouts, practices and competitions – would violate the first prong of the *Lemon* test because the sign does not have a primarily secular purpose. *See id.* at 41-42.

3. The Baseball Field Is a Non-Public Forum.

The Court must apply a forum analysis to determine whether the baseball field should be categorized as a public forum, a non-public forum or a limited public forum. Traditional public fora, such as streets and parks, which are regularly used for the purposes of assembly and communication among citizens, are afforded the greatest constitutional protection. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1983). Limited or designated public fora, such as municipal auditoriums and university facilities made available to the public or student groups, where the government designates a nonpublic forum for public discourse, are subject to the same strict constitutional scrutiny as public fora. *See id.* at 802. In contrast, nonpublic fora, such as military bases and prisons, which are not generally used for communication or assembly by the public, are subject to restrictions on speech that are reasonable and not viewpoint-based. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

As the Supreme Court noted in *Cornelius*, the determination of whether the government has created a limited or designated public forum turns on the nature of the

property, its compatibility with expressive activity and the government's intent allowing some speech activity in a place not traditionally open to speech or assembly. 473 U.S. at 802. The Supreme Court has held that a school district designates a public forum if "by policy or practice" it opens the forum in question "for indiscriminate use by the general public." *Perry*, 460 U.S. at 47. The school's intent is the critical factor in determining the type of forum at issue: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Indeed, a finding that a school district has established a designated or limited public forum requires a showing that the school had the "clear intent to create a public forum." *Id.* at 270.

In several federal cases involving circumstances similar to those presented here, the requisite intent to create a public forum was lacking. In *Perry*, for example, because the school district did not grant general access to its internal mail system and because use of the system required permission from the principal, the Court found that the school's mail system was not a public forum. *See* 460 U.S. at 46-47. Likewise, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion), the Court found that the city's policy of rejecting certain types of advertising on city buses was inconsistent with a finding that the limited available advertising space was a public forum. "In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and

make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id.* at 303; *see also Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 824 (9th Cir. 1991) (advertising space in high school newspaper, yearbook and athletic program not a public forum because school motivated by desire to raise revenue not intent to create open forum); *Brandon v. Board of Educ. of Guilderland Cent. School*, 635 F.2d 971, 980 (2d Cir. 1980) (rejecting students' effort to hold voluntary prayer sessions at school, finding "a high school is not a 'public forum' where religious views can be freely aired").

Here, because the District did not intend to open the baseball field and the outfield fence to indiscriminate use by the public, it cannot be viewed as a public forum. Rather, in keeping with the cases discussed above, the primary purpose of the outfield fence was to enclose the baseball field and its secondary purpose, under the Booster Club's advertising program, was to raise revenue for school athletic programs. Any speech activity that occurred as a result of advertising posted on the fence was purely incidental to the fence's functional and income-producing purposes. The District's decision to allow advertising at the baseball field cannot be interpreted as designating a public forum.

4. The District's Decision Was Reasonable.

Given that the outfield fence is a nonpublic forum, the Court must determine whether the District's decision to reject Mr. Di Loreto's sign was reasonable and viewpoint-neutral "Control over access to a nonpublic forum can be based on subject matter and speaker identity so

long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. A governmental restriction on access to a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808.

The Supreme Court has recognized that it is reasonable for government entities to refuse to allow what some might consider controversial speech in a nonpublic forum. Particularly in a school environment, educators must be given the authority to weigh the "maturity of the intended audience" and to refuse to "associate the school with a position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272; *see also Cornelius*, 473 U.S. at 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum); *Lehman*, 418 U.S. at 304 ("the managerial decision to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising" to avoid "the appearance of favoritism, and the risk imposing upon a captive audience" are "reasonable legislative objectives").

In *Planned Parenthood*, the Ninth Circuit held that it was reasonable for a school district to reject ads that a family planning organization sought to print in the schools' newspaper yearbook and athletic programs. The circuit found that the decision was based on a reasonable interest in maintaining neutrality on matters related to contraception and abortion, which are considered sensitive or controversial by many educators, parents and community members. 941 F.2d at 829. "Because of the possible perception of sponsorship and endorsement,

schools within the district could choose to maintain a position of neutrality on a matter of political controversy and not lend their name and resources to Planned Parenthood's advertisements." *Id.* at 830. *See also Lehman*, 418 U.S. at 303 (government acted reasonably in rejecting political ads to avoid subjecting users to "blare of political propaganda" and to avoid "sticky administrative problems" in "parceling out limited space to eager politicians").

The same analysis holds in the case at bar. It was reasonable for the District to reject Mr. Di Loreto's proposed signs because of their religious content. The District could reasonably reject all signs that were primarily religious in nature because it did not want to appear to favor one religion over another. The decision was also reasonable on the grounds that the District wished to remain neutral on the controversial issue of religious views, which many teachers, parents and community members consider personal or family matters. Just as in *Perry*, where the Supreme Court found it reasonable for a school district to refuse a non-certified union access to its internal mail system "to prevent the District's schools from becoming a battlefield for inter-union squabbles," here, the District's interest in keeping its ballfield from becoming a battleground for the promotion of religious views is equally reasonable. Furthermore, as the Defendants have testified, they were interested in maintaining a firm separation between church and state, and avoiding any litigation that might arise due to a potential violation of the First Amendment's Establishment Clause. *See, e.g., Stone*, 449 U.S. at 41-42.

Finally, because the audiences at the field are captive, the District's decision is all the more reasonable. In *Lehman*, for example, the Court found that municipal bus passengers were a "captive audience" and the city's decision to reject political advertising reasonably avoided the risk of imposing unwanted political speech on the passengers. 418 U.S. at 304.

Here, students involved in physical education classes or extracurricular sports, and community members who attend baseball games are at least as captive as passengers on a city transit system. The Attorney General opinion, adopted by Mr. Di Loreto, which asserts that students or spectators could simply avert their gaze rather than staring at the proposed sign is not persuasive. Much the same as the bus riders in *Lehman*, who presumably could have chosen to gaze out the window or shut their eyes, community members watching a baseball game or students using the field during class or as part of school athletic teams are captive. The audiences at the Downey baseball field are at the mercy of the District to exercise some discretion over what, if anything, is posted. The Court finds that it was reasonable for the District to reject Mr. Di Loreto's sign so as to avoid any appearance of favoritism; maintain its neutrality; avoid being required to open its forum to signs from competing religious viewpoints; and avoid lending its name and resources to religious speech, which some might consider controversial or inappropriate for a public school.

5. The District's Decision Was Viewpoint Neutral.

Not only was the District's decision reasonable under the circumstances presented in this case, it also did not discriminate on the basis of viewpoint. The Supreme Court has recognized a distinction between content and viewpoint discrimination. Content discrimination is that which differentiates based on the subject matter of the speech. *See, e.g., Perry,* 460 U.S. at 59 (Brennan, J., dissenting). Viewpoint discrimination differentiates based on the speaker's motivating ideology, opinion or perspective. *See Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 828 (1995).[7]"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with

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[7] In *Rosenberger,* the Supreme Court held that the University of Virginia's denial of funding to a publication whose editorial purpose was to promote a religious view improperly infringed on free speech rights and that funding the publication would not violate the Establishment clause. 515 U.S. 819. *Rosenberger* is distinguishable from the instant case because it involves speech at a university, not a high school. Because high schools act in loco parentis, they are granted considerably more control than universities over the speech to which students are exposed. *See, e.g., Hazelwood,* 484 U.S. at 270. In addition, the Court found that because the university's action was based on a regulation that expressly discriminated against publications which promote a "belie[f] in or about a deity or an ultimate reality," the university was discriminating not against religion as a subject matter but against all religious editorial *viewpoints. Id.* at 822, 831.

the intended purpose of the property." *Perry*, 460 U.S. at 49.

The record contains no evidence that the District's action was based on the views or opinion espoused by Mr. Di Loreto. As in *Perry*, there is "no indication that the school board intended to discourage one viewpoint and advance another." *Id.* at 48. Rather, Defendants have presented compelling evidence that they acted because of the religious purpose and *content* of Mr. Di Loreto's proposed speech.

Mr. Di Loreto's proposed signs contained no business designation. At no point did Mr. Di Loreto seek to use the Ten Commandments or any religious speech to promote his business, Yale Engineering. Rather, the subject matter of Mr. Di Loreto's proposed signs was plainly religious. *See Stone*, 449 U.S. at 41. The purpose of the forum was for the display of commercial speech, not religious or political or other potentially controversial speech. Because Mr. Di Loreto's proposed speech did not advertise goods or services, the District acted reasonably and without discriminating based on viewpoint in rejecting the sign due to its non-commercial content.

6. Plaintiff's Motion for Reconsideration Is Without Merit

Plaintiff has moved the Court to reconsider its May 26, 1998, Order Denying Plaintiff's Motion for summary Judgment in light of the Ninth Circuit's recent decision in *Doe v. Madison School Dist. No. 321*, 1998 WL 279221, *to be reported at* 147 F.3d 832 (9th Cir. May 27, 1998). In *Doe*, the plaintiff, on behalf of herself and her child, challenged a

high school graduation policy on student speakers. Under the policy, four student speakers are invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at *1. Under the policy the school administration could neither censor any presentation nor require any particular content. *Id.* The plaintiff sought injunctive and declaratory relief on the theory that by allowing students to inject prayers and religious speech into the graduation program, the school was perpetuating a practice of officially sanctioned religious graduation ceremonies in violation of the Establishment Clause. *Id.* The Ninth Circuit held that the policy at issue was constitutional because it neither required nor precluded students from making speeches involving religious content or a religious point of view. *Id.* at *3-5.

The Ninth Circuit's decision in *Doe* does not change the above analysis. The instant case is easily distinguished because a graduation ceremony is a one-time event, the graduation program in *Doe* contained clear disclaimers that students were solely responsible for the content of their speeches, and the decision was expressly limited to the terms of the administration's policy and the plaintiff's facial challenge. *See id.* at *6 n. 6. In contrast, Mr. Di Loreto's sign would have been posted on school grounds indefinitely, and would have been viewed during school hours and school-sponsored sporting events. In addition, the proposed sign did not contain any clear disclaimer or business designation. Moreover, Mr. Di Loreto's argument about the applicability of *Doe* is premised on his theory that the relevant government action here is the District's decision to allow advertising at its

baseball field. Having found that the government action at issue is the District's policy decision regarding whether or not to post Plaintiff's sign,[8] the Court finds that *Doe* does not control the facts of this case.

III.

CONCLUSION

For the foregoing reasons, Defendants' Motion for summary Judgment is **granted** and Plaintiff's Motion for Reconsideration is **denied.**

IT IS SO ORDERED.

DATED: August 26, 1998.

/s/ Carlos R. Moreno
Carlos R. Moreno
United States District Judge

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[8] *See* Part II.B.2. *supra.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD DI LORETO Plaintiff, v. EDWARD SUSSMAN, BETTY FERRARO, and MARGO HOFFER, Defendants.	Case No. CV 97-4028 CM **JUDGMENT** (Filed Aug. 26, 1998)

Having granted Defendants' Motion for Summary Judgment and having denied Plaintiff's Motion for Reconsideration, as set forth in the Order filed concurrently herewith,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff shall take nothing on his complaint and that the action is dismissed on the merits.

DATED: Aug. 26, 1998.

/s/ Carlos R. Moreno
Carlos R. Moreno
United States District Judge

Supreme Court, U.S.
FILED
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CLERK

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No. 99-1345

In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Respondents respectfully submit that petitioner's Petition for Writ of Certiorari misstates the California appellate court's holding when it upheld the granting of summary judgment in favor of respondents and against petitioner in the state court action arising out of the same factual assertions raised in the federal court action. The Petition for Writ of Certiorari states, at pages 6-7, that the three judge panel of the California Court of Appeals was divided "as to whether posting the Ten Commandments would violate the Establishment Clause of the California Constitution, and no majority opinion was formed on the issue." (Petition for Writ of Certiorari, footnote 2, pages 6-7.)

However, the opinion in *DiLoreto v. Board of Education of the Downey Unified School District*, 74 Cal.App.4th 267, 87 Cal.Rptr. 791 (1999), *Petition for Review Denied* (Justice Kennard and Justice Brown dissenting from the Denial of Petition for Review) clearly stated that the appellate court found that the posting of the Ten Commandments at a public school baseball field would violate the Establishment Clause of Article 1, Section 4 of the California Constitution. Justice Nott wrote for the majority. Justice Zebrowski concurred stating:

> "Respondents acted properly *even if the posting of appellant's sign would not have violated the Establishment Clause*. The baseball field was not a public forum for religious proselytizing. The school was not required to expend funds litigating the issue against whoever might choose to sue." *DiLoreto, Ibid.*, at 283. [Emphasis added.]

The third justice, Justice Mallano, concurred in the result and specifically stated he did not agree that the proposed advertisement containing the Ten Commandments would contravene the Establishment Clause of the California Constitution. However, the majority opinion, in which Justice Zebrowski concurred, clearly states at Section II that the California Constitution's Establishment Clause would be violated by the posting of petitioner's advertisement sign. As petitioner notes in his Petition for Writ of Mandate:

> "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." Petition for Writ of Certiorari, page 23.

As California has declared that posting petitioner's sign at a public school baseball fence violates *California's* Constitution, respondents' rejection of the sign was reasonable and proper and did not violate petitioner's freedom of speech.

Alternatively, respondents submit that a public high school is a non-public forum for non-students and, under this court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1998), respondents acted reasonably in rejecting the sign.

Respondents further submit that there is no conflict among the decisions of the various courts of appeals of the circuits, as this court has previously held that a school is not a public forum under the undisputed facts presented below and no circuit court has held otherwise.

Finally, respondents submit that under this court's ruling in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the Establishment Clause of the First Amendment of the United States Constitution would be violated by the posting of petitioner's sign on the baseball field fence.

For all of the above reasons, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

I. CALIFORNIA COURTS HAVE DETERMINED THAT POSTING THE PETITIONER'S SIGN ON THE BASEBALL FIELD FENCE WOULD VIOLATE CALIFORNIA CONSTITUTION ARTICLE I, SECTION 4.

As noted in the Petition for Writ of Certiorari, petitioner pursued this case against respondents, as well as Downey Unified School District, in California State courts. Summary judgment was granted in favor of respondents pursuant to the California State Constitution's Establishment Clause set forth at Article I, Section 4. That section states:

> "Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no law respecting an establishment of religion."

On appeal to Division 2 of the Second Appellate District of the California Court of Appeals, the court specifically affirmed the granting of summary judgment

in favor of respondents on the grounds that posting DiLoreto's sign on the wall of the high school baseball field would violate California's Establishment Clause. The court's opinion, offered by Justice Nott, sets forth at Section II the court's grounds for concluding that the Ten Commandments posted on the baseball field fence would violate California's Constitutional prohibition against the establishment of religion.

Justice Zebrowski, noted as "concurring", states:

> "Respondents acted properly *even if the posting of appellant's sign would not have violated the Establishment Clause." DiLoreto, Ibid.*, at 283 [emphasis added].

Clearly, Justice Zebrowski is concurring in the judgment, thus finding that the posting of the sign would violate California's Establishment Clause.

In contrast, Justice Mallano, also listed as "concurring", states:

> "While I concur in the result, I do not agree with Part 2 of Justice Nott's opinion holding that appellant's proposed paid advertisement containing the Ten Commandments contravenes the Establishment Clause of the California Constitution." *DiLoreto, Ibid.*, at 283.

Respondents respectfully submit that the decision of the California Appellate Court concerning the issue of Establishment Clause violation has been clearly set forth at Section II of the appellate court's opinion in *DiLoreto v. Board of Education of the Downey Unified School District, supra*. It is clear that Justice Zebrowski concurred in the majority opinion, just as it is clear that Justice Mallano

did not agree that California's Establishment Clause would be violated by the posting of the sign. Therefore, the opinion complies with Article 6, Section 14 of the California Constitution and states the law of California on this issue.

California courts look to federal cases in interpreting its own Constitution's Establishment Clause; however, "California courts must independently determine its scope." *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863 at 883, 281 Cal.Rptr. 34, 809 P.2d 809 (1991).

On Petition for Review, the California Supreme Court denied review, with two justices dissenting to the denial of review. As such, respondents respectfully submit that the law of the State of California concerning the State Constitution's Establishment Clause has been determined by California State courts. That determination, *regarding this very case*, is that the posting of Mr. DiLoreto's sign on the baseball field of the high school within Downey Unified School District would violate California's Constitution. Respondents respectfully submit that this court need look no further in denying the Petition for Writ of Certiorari. The petition itself states, at p. 23:

> "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."

California law is clear:

> "We conclude that by utilizing its discretion to reject appellants' sign, respondents acted responsibly and within the mandates of the Establishment Clause. Stated another way, if they had accepted the sign and posted it,

respondents would have violated the Establishment Clause." *DiLoreto, Ibid.*, at 278. [Majority Opinion.]

Absent a showing by petitioner that the California courts' interpretation of California's Constitution has resulted in a violation of petitioner's federal rights, respondents respectfully submit that this court should deny the Petition for Writ of Certiorari.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE BASEBALL FIELD FENCE WAS A NON-PUBLIC FORUM

Petitioner sets forth at page 8 of his Petition for Writ of Certiorari the three types of fora created by government for expression on its property, and the ability of government to regulate speech depending on the type of forum created. Respondents do not disagree with this characterization. However, in the context of a public high school, respondents submit that the school is always deemed to be a non-public forum absent "the requisite 'clear intent to create a public forum' *Hazelwood* requires. 484 U.S. at 270, 108 S.Ct. at 569." *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 at 825 (9th Cir. 1991).

As this court noted in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988), a public school is deemed a *non-public forum* unless the school demonstrated a "clear intent to create a public forum". *Hazelwood, Ibid.*, at 484 U.S. 270, 108 S.Ct. at 569, quoting *Cornelius [v. NAACP Legal Defense Fund]*, 473 U.S. 788 at 802, 105 S.Ct. at 3449-3450 (1985). *See also Brandon v. Board*

of Ed. of Guilderland Cent. Sch., 635 F.2d 971, 980 (2d Cir. 1980).

The Ninth Circuit herein found that the District did *not* intend to designate the baseball field fence as a public forum for expressive activity on the grounds that:

(1) Advertising space on the fence was sold to defray athletic program expenses by raising revenue through the Booster Club, rather than to open a forum for debate;

(2) The District solicited advertisements from local businesses, thereby limiting the content of the forum through its very own solicitation practices;

(3) The District rejected advertisements for alcohol and taverns as well as from Planned Parenthood; and

(4) Respondents testified that they did not personally object to the content of petitioner's advertisement, but were concerned that accepting the advertisement would indiscriminately open the forum to all advertisements regarding personal beliefs (Appendix 13).

Respondents respectfully submit that the District Court, as well as the Ninth Circuit, correctly applied the appropriate legal standards with the undisputed facts to conclude that there was no demonstration that the District intended to create a public forum open to the indiscriminate use by the general public, as required by *Hazelwood*. As such, the District's conduct regarding the speech allowed on the fence need be only (1) reasonable in light of the purpose served by the forum; and (2) viewpoint neutral. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 at 829, 115 S.Ct. 2510 (1995).

A. RESPONDENTS' CONDUCT WAS REASONABLE

The Ninth Circuit further correctly determined that, as a non-public forum, the conduct of respondents in rejecting petitioner's advertisement containing the Ten Commandments was reasonable. The proposed advertisement clearly raised Establishment Clause *concerns*, whether or not posting the advertisement would ultimately have been held a violation of that Clause: posting the sign would clearly have invited expensive litigation. The fact that respondents were joined by the Anti-Defamation League as amicus curiae in this action strongly suggests that litigation would have occurred had the District posted the sign. As the limited purpose of opening the non-public forum was to raise revenue, and as the posting of petitioner's sign would have invited expensive litigation, such posting would have thereby defeated the entire purpose of opening the forum.

In addition, respondents testified that posting petitioner's advertisement would force the District to open the forum to all expressions of personal beliefs. As the baseball field fence surrounded an area used for physical education classes, the Ninth Circuit correctly held that the District acted reasonably in avoiding changing the baseball field fence from an outer boundary of the baseball field into a forum for contentious debate.

This court has recognized a school district's right to refrain from using its property to "associate the school with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272, 108

S.Ct. at 570. Thus, respondents acted reasonably in rejecting the sign.

B. RESPONDENTS' CONDUCT WAS VIEWPOINT NEUTRAL

Finally, the rejection of petitioner's advertisement was not viewpoint discrimination. The record establishes that all of the other signs on the fence advertised businesses or charitable organizations. None of the other signs expressed religious views or personal opinion. As such, the rejection of Mr. DiLoreto's sign was viewpoint neutral.

III. THERE IS NO CONFLICT AMONG THE DECISIONS OF THE DISTRICT WARRANTING REVIEW BY THE UNITED STATES SUPREME COURT

Petitioner argues that the decision of the United States Court of Appeals for the Ninth Circuit in the present case, as well as *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1804, 143 L.Ed.2d 1008 (1999), and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1990), are in conflict with holdings of the United States Court of Appeals for the Second, Third and Seventh Circuits. Petitioner cites three cases from those circuits concerning the sale of advertising space on public transit vehicles. (*Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Trans. Auth.*, 148 F.3d 2424 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct.

797, 142 L.Ed.2d 659 (1999); *New York Magazine v. Metropolitan Transit Auth.*, 136 F.3d 123 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998); and *Planned Parenthood Association/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1255 (7th Cir. 1985).) Respondents respectfully submit that cases concerning the appropriate limitations placed by public transit authorities on bus advertising are inapplicable to the present case.

As noted above, this court in *Hazelwood* held that public schools are presumed a non-public forum absent a clear intent by the school to open the forum. As the Ninth Circuit stated in *Clark, supra*:

> "The court in *Hazelwood* made a number of important statements about the nature of a high school's mission. Its discussion on the measure of school officials' authority over school-sponsored publications informs our analysis of both the nature of the government property involved and the justification for the restrictions imposed." *Clark*, 941 F.2d at 828.

Unlike public transportation, where advertisements are typically seen as not representing the viewpoints of the transit authority, school districts tend to be viewed as giving their "imprimatur" to the views contained in school-sponsored publications and school classrooms. As the *Clark* court noted:

> "When school facilities are not opened up as forums for public expression, *Hazelwood* recognizes the school's broad authority over school-sponsored speech. In light of the nature of the school environment, educators must have the ability to consider the 'emotional maturity of the intended audience' as well as the authority to refuse to 'associate the school with any position

> other than neutrality on matters of political controversy'. *Hazelwood*, 484 U.S. at 272, 108 S.Ct. at 570." *Clark*, 941 F.2d at 829.

Another case from the Seventh Circuit is more on point with the present case than *Planned Parenthood v. Chicago Transit Auth.* cited by petitioner. In *Berger v. Rensselaer Sent School Corp.*, 982 F.2d 1160 (7th Cir. 1993), the Seventh Circuit examined a school district's policy of allowing the Gideons to distribute Bibles at an elementary school on an annual basis. Unlike the present case, the District defended the policy of the Gideons. As in the present case, the argument was made that the District could not restrict the free speech rights of the Gideons by preventing them from coming onto the public school property to pass out Bibles. *Berger*, 982 F.2d at 1165.

The *Berger* court, in rejecting the free speech argument, stated:

> "As in *McCollum*, the Gideons used Rensselaer's tax supported public schools, relying on the state's compulsory public school machinery, to disseminate religious material to fifth graders." *Berger*, 982 F.2d at 1168.

In the present case, a non-member of the Downey Unified School District, Mr. DiLoreto, is also attempting to use tax-supported public schools where students are compelled to attend, to disseminate his religious views. The *Berger* court went on to reject that the Gideons' free speech rights were being violated as follows:

> "Defendant is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state sponsored religious activity.

> The reverse is true in the coercive context of public schools." *Berger*, 982 F.2d at 1168.

After examining various cases where the Establishment Clause took precedence over free speech rights, the *Berger* court noted:

> "In each of these cases, people were kept from exercising very real First Amendment rights to, for example, pray or meditate or proselytize. The conflict between free speech and Establishment Clause interests arises because most religious activity necessarily involves expressive activity, and this expression may be stifled in the government's vigilance to remain neutral toward religion." *Berger*, 982 F.2d at 1168.

There is no conflict between the Ninth Circuit's holding in *DiLoreto* and the Seventh Circuit's holding in *Berger*. Both courts hold that non-students do not have a right to enter public school property and proselytize religious views to a captive audience: the students. As there is no conflict among the circuits, nor within the holdings of this court, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

IV. THE FEDERAL CONSTITUTION'S ESTABLISHMENT CLAUSE WOULD BE VIOLATED BY POSTING PETITIONER'S SIGN

The Ninth Circuit failed to reach the issue of the Establishment Clause consequences of posting the advertisement. Respondents submit that clear Supreme Court precedent establishes that the sign's posting would have violated the Establishment Clause of the First Amendment.

The First Amendment of the United States Constitution decrees, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. Const. Amend I. To meet this requirement, "religion must be a private matter" wholly untouched by state involvement or sponsorship. *Lemon v. Kurtzman*, 403 U.S. at p. 625. The Establishment Clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

The parity between the instant case and *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d at 1919 (1980) is striking. Both involve high schools and Ten Commandments signs. In both cases, a private individual/group would fund the signs. The Ten Commandments signs in *Stone* were to be posted on the interior classroom wall; petitioner in this case seeks a display of the Ten Commandments on the baseball field fence – an outdoor "classroom" for physical education courses and school athletics. (See *Jager v. Douglass County Sch. Dist.*, 862 F.2d 824, 831 (7th Cir. 1989), which holds that religious invocations on the football field violate the Establishment Clause). Further, the Kentucky statute at issue in *Stone* provided that private funding would pay for the Ten Commandments signs, which is akin to petitioner paying for his sign. The language in the Ten Commandments has not changed, and respondents urge that the holding in *Stone* is directly applicable to the case at bar.

A policy will not offend the Establishment Clause if it can pass the following three-pronged test: (1) It has a secular legislative purpose; (2) its principal or primary effect would be neither to advance nor to inhibit religion; and (3) it does not foster an excessive government entanglement with religion. *Widmar v. Vincent*, 454 U.S. 263, 270-275 (1981) (the "*Lemon* test", named after *Lemon v. Kurtzman*, 403 U.S. 602, although it references a body of jurisprudence). If any of the three prongs is not met, the policy violates the Establishment Clause.

Posting the Ten Commandments under the pretext of an "advertisement" on a public school wall would constitute failure of the first and second prongs of the *Lemon* test.

1. Posting the Ten Commandments at the Baseball Field Would Violate the First Prong of the *Lemon* Test ("Secular Legislative Purpose")

The first prong of the *Lemon* test is that the state action must have a "secular legislative purpose". Allowing the Ten Commandments to be posted, as sought by petitioner, would not have a "secular legislative purpose", and accordingly would violate the first prong of the *Lemon* test.

The posting of the Ten Commandments at a school has already been addressed by the U.S. Supreme Court. In *Stone v. Graham*, 449 U.S. 39 (1980) a Kentucky statute requiring the posting of the Ten Commandments was unconstitutional under the first prong of the *Lemon* test

("secular legislative purpose") and thus violated the Establishment Clause. The *Stone* court noted:

> "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15. This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp* [374 U.S. 203 (1963).] Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."
>
> *Stone v. Graham*, 449 U.S. at 41-42 (1980) [emphasis added] [footnote omitted]

The *Stone* court further noted:

> It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits. *Stone, supra,* 449 U.S. at p. 42 (quoting *Schempp, supra,* 374 U.S. at 222; *see Engel v. Vitale,* 370 U.S. 421, 431 (1962)). [emphasis added]

This Court has previously found, in the context of a school prayer case, that there is no meaningful distinction between school authorities actually organizing the religious activity and officials merely "permitting" students to direct the exercises. *Board of Education of the Westside County Sch. v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 141 (1990).

Further, a public school may act in a manner that would otherwise violate free speech rights where necessary to avoid breaching the Establishment Clause. *Berger v. Rensselaer Cent. Sch. Corp.,* 982 F.2d 1160, 1169 (7th Cir. 1993).

There is no "secular legislative purpose" to a high school policy allowing the Ten Commandments to be posted by petitioner. Accordingly, the first prong of the *Lemon* test is violated, and for this reason alone, the Establishment Clause prohibits petitioner's Ten Commandments sign from being erected.

2. Posting the Ten Commandments at the Baseball Field Would Violate the Second Prong of the *Lemon* Test ("Primary Effect of Advancing Religion")

To satisfy the second prong of the *Lemon* test, the principal or primary effect can be neither to advance nor to inhibit religion. The *Stone* decision never reached this second prong of the *Lemon* test because a violation of the first prong alone was sufficient to strike down the Kentucky statute.

"The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982). An important concern of the effects test is thus "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985).

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982). This symbolic inference is too dangerous to permit. *Id.* The *Lubbock* court noted:

> "As a result of this special concern for the religious neutrality of our educational system, many religious activities occurring in school facilities during school hours have been declared unconstitutional." (Citing *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in Kentucky public schools unconstitutional). *Id.* at p. 1040-41.

With regard to the issue of the operational hours of the school, it must be remembered that the petitioner's sign would be posted constantly, just like in the *Stone* case, on a space which is deemed a classroom and which is filled, as a matter of course, with impressed and impressionable students.

Further, it cannot be overlooked that this is a public high school where young people are required to attend and to receive an education. As explained by the Seventh Circuit:

> "There may be special problems when the audience is young, captive, or both. Sessions of a legislature may open with prayer, [citation], but sessions of school may not. *Engel v. Vitale*, 370 U.S. 421 [citations]. Children are summoned by law to school; even if told they need not pray, they will be subject to pressure to do so. Children's ridicule and ostracism of their peers for nonconformity may be more compelling than any fine the government could impose. So, too, *Stone v. Graham*, 449 U.S. 39, [citations] (1980), which involved the posting of the Ten Commandments in a classroom, dealt with a captive audience. When the audience can avert its eyes, walk away, or talk back, speakers have greater freedom." *American Jewish Congress v. City of*

> *Chicago*, 827 F.2d 120 (7th Cir. 1987) [nativity scene in city hall violates Establishment Clause].

In this case, the students of Downey High School are a captive audience, unable to avert their eyes when using the subject athletic field during physical education classes or sports programs. Under these circumstances, the freedom of the speaker must be more circumscribed.

Respondents submit that the first and second prongs of the *Lemon* test would be violated by posting petitioner's sign and, as such, would violate the Establishment Clause of the First Amendment. Therefore, the Petition for Writ of Certiorari should be denied.

V. CONCLUSION

In announcing the standard that school officials should retain control over the content of school-sponsored expressive activities, the court in *Hazelwood* stated:

> "This standard is consistent with the oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers and state and local officials, and not of federal judges." *Hazelwood*, 484 U.S. 260 at 274, 108 S.Ct. 562 at 571.

It is this standard, in part, which confirms that respondents in this case did not violate petitioner's constitutional rights by determining that his proposed advertisement was inappropriate for the baseball field fence.

Finally, respondents respectfully submit that the Court of Appeals in California eloquently summarized the situation in its opinion in *DiLoreto v. Board of Education*, 74 Cal.App.4th 267 (1999):

Appellant argues that the California Constitution prohibits respondents from terminating the program. He argues that once respondents 'opened the forum,' they were obligated by the Constitution to continue the program and, if necessary, to litigate with all comers, no matter what the cost in computers, music and drama programs, educational materials, athletic equipment, etc., which might be lost due to the division of funds to finance litigation. Appellant contends that these open-ended costs and losses would have to be born by respondents, and ultimately by the students of respondents' school district, simply because respondents tried to raise funds to refurbish the baseball field. The Constitution does not require such a nonsensical result. The practicalities of this situation gave appellant an effective veto power over the baseball fund raising program. Unfortunately, he chose to exercise that power. Still more unfortunately, he chose to impose litigation costs on respondents when they followed the only reasonable course left open to them. The California Constitution does not require, however, that the school coffers be further depleted with the continuing litigation appellant now desires." *DiLoreto*, 74 Cal.App.4th at 271-272.

Respondents respectfully request that the court avoid further depletion of the District's coffers and deny the Petition for Writ of Certiorari.

Respectfully submitted,

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